INDEX

Page

Preliminary Statement 1

Statement of Case..... 12

(1) The Pleadings 14
(a) Bill of Complaint..... 14
(b) Motions to Dismiss..... 24
(c) Answer of Respondents..... 27

(2) Trial of Cause..... 39
(a) Complainant's Evidence 39
(b) Respondents' Evidence 40

(3) Findings by the District Court..... 52

(4) Motion to Retax Costs..... 55

(5) Decree of District Court..... 56

(6) Opinion and Decree, Circuit Court of Appeals..... 60

(7) Assignments of Error on Appeal to United States Supreme Court 73

(8) Motion to Dismiss Appeal..... 91

ARGUMENT.

I The District Court Had No Jurisdiction of the Action, for the Reason That the Suit Was One Against the State of Colorado Without Its Consent, in Violation of the Provisions of the Eleventh Amendment to the Constitution of the United States, and the State of Colorado Was an Indispensable Party 91

(1) The Suit Involves the Title of the State of Colorado to the Water of the North Fork of the Republican River Flowing in Colorado 95
All Rights Vested After Admission of States..... 96
No Government Lands Involved..... 96
All Rights Limited by Colorado Laws..... 96

(2) The Decree of the United States District Court Gives Extra-territorial Effect to the Void Decree of a Nebraska Tribunal and Expropriates the Property and a Natural Resource of Colorado, Without Its Consent, for the Benefit of Citizens of Nebraska..... 117

(a) The Decree Entered by the State Board of Irrition, Highways and Drainage of Nebraska Is Void... 117

(b) The Decree of the Nebraska Board Could Have No Extra-territorial Effect 124

(c) The Decrees of the District Court and the Circuit Courts of Appeals Expropriate the Property of Colorado, Without Its Consent, and Impose a Foreign Servitude Upon Colorado and Its Territory..... 126
Cases Similar to One at Bar..... 132

Page

(3) No Rights or Privileges Secured to Complainant by the Constitution and Laws of the United States Involved.... 142

(a) Equal Rights Are Not Denied Complainant..... 146

Decree of State Court Conclusive and **res judicata** and Suit in District Court a Collateral Attack....150

(b) No Rights of Interstate Commerce Involved..... 154

(c) No Other Rights Under the Constitution and Laws of the United States Affected..... 168

(4) The Case Involves an Attempt to Control the Action of the State of Colorado. It Likewise Involves the Political Direction of the Executive Officers of the State of Colorado, Contrary to the Laws of the State..... 172

(5) The State Is the Real Party in Interest. The Suit and the Decree Entered Therein Involve a Limitation of the Sovereign Rights of the State of Colorado..... 205

(6) The State of Colorado Was an Indispenable Party..... 208

(7) The Suit Would Remain One Against the State if the Official Respondents Had Been Dismissed..... 216

(8) Conclusion of Part I..... 218

II Riparian Rights of Colorado Landowners and Equitable Apportionment of the Waters of the Stream..... 219

(1) Riparian Rights of Colorado Landowners..... 221

(2) Equitable Apportionment of the Benefits of the Stream.. 229

III Conclusion 232

APPENDIX.

Page

Part I—Colorado:

(1) Enabling Act i

(2) Constitution v

Part II—Act of Colorado and Act of New Jersey—Prohibiting Diversion of Water Out of State for Use in Other States vi

Part III—Other Acts of Colorado Legislature Reaffirming Provisions Colorado Constitution ix

Part IV—Revised Statutes of Colorado, 1908..... xi

Part V—Nebraska Statutes xxxv

CITATIONS

Cases.

Page

Anderson vs. Bassman, 140 Fed., 14 226
Antoni vs. Greenhow, 107 U. S., 769 195
Ayers, In Re, 123 U. S., 443 ..... 191, 195, 196, 198, 208, 211

Bacon vs. Walker, 204 U. S., 311 112
Belknap vs. Schild, 161 U. S., 11 212
Bergman vs. Kearney, 241 Fed., 884 170

Clark vs. Nash, 198 U. S., 361 151
Coyle vs. Oklahoma, 221 U. S., 559 ..... 112, 169
Crawford Co. vs. Hathaway, 67 Neb., 325 222
Crosby vs. Hanover, 36 N. H., 404 129
Cunningham vs. Macon and Brunswick R. R. Co., 109 U. S., 446 ..... 207, 209, 217

Debs, In Re, 158 U. S., 564 183

Farm Inv. Co. vs. Carpenter, 9 Wyo., 110 103
Farnum vs. Blackstone Canal Co., 1 Sumner, 46, 62 125
Farmers Irr. Dist. vs. Nebraska, 244 U. S., 325 151
Farmers' Union D. Co. vs. Rio Grande Canal Co., 37 Colo., 512, ... 8, 152, 180
Fort Morgan Land and Canal Co. vs. South Platte D. Co., 18 Colo., 1 ..... 105, 175

Geer vs. Connecticut, 161 U. S., 519 157
Georgia vs. Tenn. Copper Co., 206 U. S., 230 ..... 112, 205, 214
Georgia vs. Madrazo, 1 Pet., 110 189
Grover Irr. Co. vs. Lovella Ditch Co., 21 Wyo., 204 ..... 132, 136, 139

Hagood vs. Southern, 117 U. S., 52 ..... 174, 184, 186, 207, 210
Harkrader vs. Wadley, 172 U. S., 148 ..... 198, 208
Hardin vs. Jordan, 140 U. S., 371 150
Hawkins vs. Bleakly, 243 U. S., 210 ..... 104, 169, 170
Hilton vs. Guyot, 159 U. S., 113 126
Holyoke Water Power Co. vs. Conn. River Co., 52 Conn., 570 130
Hopkins vs. Clemson College, 221 U. S., 636 ..... 200, 208, 213
Hudson Co. Water Co. vs. McCarter, 209 U. S., ... 349, 110, 113, 116, 160, 205, 214

Ind. Ditch Co. vs. Agricultural D. Co., 22 Colo., 513 180
International Postal Supply Co. vs. Bruce, 194 U. S., 601 212

Kansas vs. Colorado, 185 U. S., 125 ..... 113, 114, 116, 203, 205, 214, 220, 229
Kansas vs. Colorado, 206 U. S., 46 ..... 104, 112, 113, 114, 116, 133 151, 162, 169, 170, 183, 202, 205, 214, 220, 225, 226, 229

Lankford vs. Platte Iron Works Co., 235 U. S., 461 ..... 200, 208, 214
Lamson vs. Valles, 27 Colo., 201 ..... 8, 118, 120, 121, 132, 140, 147, 149, 179
Louisiana vs. Jumel, 117 U. S., 711 ..... 175, 184, 187, 207
Louisiana vs. Texas, 176 U. S., 1 ..... 114, 183, 197, 198
Lowndres vs. Huntington, 153 U. S., 1 150

Page

Manville vs. Worcester, 138 Mass., 89.....130, 131
Marshall Dental Mfg. Co. vs. Iowa, 226 U. S., 460..... 151
McCarter vs. Hudson Co. Water Co., 70 N. J. Eq., 525.....9, 110, 145
McCarter vs. Hudson Co. Water Co., 70 N. J. Eq., 695...132, 133, 144, 163
McCready vs. Virginia, 94 U. S., 391..... 103
McGilvray vs. Ross, 215 U. S., 70.....112, 151
Minnesota vs. Hitchcock, 185 U. S., 373.....94, 116, 208
Missouri vs. Illinois, 180 U. S., 208..... 116
Missouri vs. Illinois, 200 U. S., 496..... 116
Murray vs. Wilson Distilling Co., 213 U. S., 151.....200, 214

New Mexico vs. Lane, 243 U. S., 52.....115, 214
Northern Pac. Ry. Co. vs. Duluth, 208 U. S., 583.....97, 111

O'Neill vs. Northern Colo. Irr. Co., 56 Colo., 545;
242 U. S., 20.....8, 97, 111, 152, 180

Pennoyer vs. McConnaughty, 140 U. S., 1.....192, 208

Scott vs. Lattig, 227 U. S., 229.....112, 169
Snyder vs. Colo. Gold Dredging Co., 181 Fed., 62.....112, 205
Stanley vs. Schwalby, 162 U. S., 255..... 214
St. Anthony Fall, etc., Co. vs. St. Paul Water Comm., 168 U. S., 349.. 150
Stephens vs. Texas Co., 100 Tex., 177..... 195
Stockman vs. Leddy, 55 Colo., 24
105, 118, 121, 141, 145, 147, 149, 179, 183, 203, 224

Turley vs. Furman, 16 N. Mex., 253.....120, 132, 140

United States vs. Cress, 243 U. S., 316.....104, 112, 116, 151
United States vs. Harris, 106 U. S., 629.....112, 169
United States vs. Rio Grande Dam and Irr. Co., 174 U. S., 690..... 112

Walbridge vs. Robinson, 22 Ida., 240.....121, 122, 129, 145
Wheeler vs. Northern Colorado Irr. Co., 10 Colo., 582.....104, 179
Whitaker vs. McBride, 197 U. S., 510..... 150
White vs. Highline Canal Co., 22 Colo., 191..... 97

Miscellaneous.

Amer. and Eng. Enc. Law, Vol. 10, p. 1051..... 126
Black on Inter. Law, p. 91..... 126
Cooley Const. Limitations (7th Ed.), p. 176.....100, 125
Fruend on Police Power, Sec. 417..... 103
Kinney on Irrigation and Water Rights (2nd Ed.), Sec. 372, p. 633.... 102
Opinions of Attorney Gen. (U. S.) Judson Harmon, Vol. XXI, pp. 280-3 .....132, 139, 140
Opinion of Attorney General, Wyoming (Biennnial Rep. Atty. Genl., Wyo., 1915-16), p. 75..... 122
Story on Conflict of Laws, Ch. 2, Sec. 32.....99, 124
Wharton Int. Law Digest, Vol. I, p. 38..... 129
Wiel on Water Rights (3rd Ed.), Sec. 126, 748 and 861..... 222
Eleventh Amendment to the Constitution of the United States..... 93
Constitution of Colorado, Act 16, Sec. 5 (See Appendix—Part I)....4, 101
S. L., Colo., 1917, Ch. 83, p. 296 (Appendix—Part II)..... 111
S. L., Colo., 1917, Chap. 151, p. 539 (Appendix—Part III)..... 110

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 435.

ADELBERT A. WEILAND, AS STATE ENGINEER OF THE STATE OF COLORADO, ET AL.,
APPELLANTS,

vs.

THE PIONEER IRRIGATION COMPANY,
APPELLEE.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR APPELLANTS.

PRELIMINARY STATEMENT.

The Republican River heads in the table-lands of eastern Colorado and drains the prairie region lying between the drainage areas of the South Platte and Arkansas Rivers. Entering Nebraska near the southwest corner, it flows easterly about 220 miles when it turns south into Kansas near Superior, Nebraska. Throughout its course the stream is sup-

plied by spring-fed tributaries. In eastern Colorado and western Nebraska, where the rainfall is limited and the direct run-off is rapid, the river bed often is dry in midsummer, and the waters sink into the sands of the stream. This loss of water is due to the limited supply and evaporation. At the mouths of many of the spring-fed tributaries the flow is revived for a short distance and such dry and running portions of the course of the river alternate as far East as Superior, Nebraska, during periods of drought (Water Supply Paper No. 216, U. S. Geological Survey).

Four principal tributaries of the Republican River have their rise in Colorado. Enumerating from north to south they are:

The Frenchman, draining portions of Logan, Sedgwick and Phillips Counties;

The North Fork, draining portions of Washington and Yuma Counties;

The Middle Fork or the Arickaree, draining portions of Washington, Yuma and Lincoln Counties; and

The South Fork, draining portions of Kit Carson and Yuma Counties.

All of these tributaries are spring-fed at their sources and are streams of disappearing flow.

The North Fork of the Republican River is the stream here involved. It has its source in Yuma County, Colorado, a few miles above Wray, where numerous springs afford the principal water supply. It flows easterly through the town of Wray and enters Nebraska near the southwest corner, where it unites with the Arickaree or Middle Fork near Haigler. From its source at the springs west of Wray, the North Fork flows a distance of about 18 miles in

Colorado. Several small spring-fed tributaries discharge their waters into the stream along its course to a short distance below Wray, but from that point easterly to the interstate line the flow gradually diminishes as the waters are absorbed into the sands, and go to form the underflow of the river valley to the south of the bed of the stream. Within this latter area and from 2½ miles east of Wray to the confluence of the North Fork with the Middle Fork or Arickaree at Haigler, the ground surface to the south of the stream is considerably below the bed of the river, and the surface of the waterplane within the area has a decided fall from the bed of the river to the south—this waterplane evidently receiving its supply from the waters which disappear into the sands of the stream (see cross-section profile of valley of North Fork, Republican River, page 49, Transcript of Record).

The upper portion of the valley of the North Fork in Colorado is very narrow and confined between high, and in many places, precipitous bluffs. The lands irrigated from the spring waters of the stream are riparian and are immediately adjacent to the stream, and irrigation is confined entirely to the narrow river bottom lands. Water applied to these lands immediately sinks into the soil and returns to the stream to be rediverted, reapplied and again returned with each succeeding ditch down the stream. All of the waters of the stream, except in times of flood from storms of heavy precipitation, have their source from springs above and in the vicinity of Wray, Colorado, and their use is confined to the narrow strips of riparian land lying adjacent to the stream, and with but slight diminution of the flow, as irriga-

tion progresses downstream to the point where increment from tributary streams ceases and the river begins to disappear into the underlying drift of the river bottom.

As the stream enters Nebraska the valley becomes wider and the water from the Colorado springs used, but not consumed, upon the limited area of Colorado land finds its way into the lower state, so that after all possible use has been made in Colorado the major portion of the water reaches the canal here involved, or passes on down the stream into Nebraska and is available for use on the irrigable area in that state.

The State of Colorado was admitted into the Union "upon an equal footing with the original states in all respects whatever" by proclamation of the President of the United States on August 1, 1876, pursuant to the terms and provisions of the Enabling Act, approved March 3, 1875 (18 U. S. Stat. at L., 474). In the Constitution adopted by the people of Colorado, pursuant to the Enabling Act and approved by the proclamation of the President (as authorized by Section 5 of the Enabling Act), Article XVI., Section 5, provides:

> "The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."

This provision of the Constitution has never been amended and still remains as adopted in 1876.

(For Enabling Act and Constitution see Appendix, Part I.)

Thereafter an elaborate irrigation code was adopted by the legislature, putting into effect the Constitutional provisions and the Constitution and statutes were repeatedly construed and upheld by the Colorado courts (Appendix, Parts II., III. and IV.).

While the lands along the North Fork of the Republican River in Colorado were settled and passed from the United States prior to 1889 (R., 18), the first diversion of the water from the stream was made June 1, 1887 (R., 3), eleven years subsequent to the adoption of the Colorado Constitution and, as we shall later observe in this brief, many years subsequent to the enactment of the Colorado statutes regulating the diversion and distribution of water and defining the duties of the executive officials of the state, the State Engineer, Division Engineers (formerly Superintendent of Irrigation) and Water Commissioners.

Prior to April 4, 1890, The Haigler Land and Canal Company, a corporation, was formed under the Constitution and laws of the State of Colorado (R., 2-3), and this Colorado corporation, acting under and limited by the Constitution and laws of the state, on April 4, 1890, initiated an appropriation of water from the North Fork of the Republican River, as the same then flowed through the State of Colorado, for the irrigation of a strip of land lying to the south of the stream along the river valley for a distance of about seven miles west of the Colorado-Nebraska line, and this company in the construction of its canal, notwithstanding the limitations imposed upon it by the Constitution, laws and decisions of the

courts of the State of Colorado, under which it was formed, and within whose jurisdiction the division was made, constructed its canal over the interstate boundary, so as to serve lands in Nebraska along the North Fork and between the North and Middle Forks of the Republican River. As we shall more at length hereinafter observe, the construction of this canal into Nebraska was without authority of law, contrary to the Constitution, laws and decisions of the courts of Colorado regarding irrigation and under which the corporation was formed and existed.

After the construction of its canal with its headgate about five miles below the town of Wray, Colorado (Map R., 43), the Colorado corporation diverted the residuum of the water flowing in the stream after all Colorado uses had been satisfied, and applied the same to a greater or less degree upon lands irrigable from its canal. This canal, as will be observed from the map attached to the record (R., 43), diverts water from the stream below all of the other ditches taking water in Colorado (except one small ditch supplied entirely by the return flow entering the stream below the dam of the corporation's ditch), and is so situate that it receives practically all of the return flow from irrigation of the narrow strip of river bottom served by all of the ditches above (R., 20) so that there was no lower appropriator upon the stream in Colorado to question the right of the Colorado company to divert all of the waterflow in the stream at its headgate or to use the same wherever it saw fit, or to call into question its authority as a Colorado corporation to convey water into Nebraska in violation of its corporate powers and in violation of the Constitution, laws and decisions of the courts of the State of Colo-

rado regarding the ownership, control and use of the waters of the natural streams of the state. Being the lowest diversion upon the Colorado stream, it was a matter of no concern to the other and upper appropriators (junior and senior) where the Colorado corporation used the water left remaining in the stream at its headgate, even though it diverted all of the flow of the stream, so long as the upper appropriators, senior and junior, were not compelled to shut down their headgates in order to pass water down the stream to the lower canal. Owing to these conditions and circumstances, no occasion seems to have arisen whereby the Colorado corporation was compelled to limit the use of the Colorado stream to lands within the state.

Proceedings for the adjudication and determination of the priorities, quantities and relative rights of the several ditches, canals and reservoirs on the North Fork of the Republican River in Colorado were finally initiated before the District Court of Phillips County, Colorado, and final decree was entered therein, pursuant to the Colorado law, in July, 1912.

The Colorado corporation, The Haigler Land and Canal Company, so owning the canal above described, appeared in said adjudication proceeding and submitted its claims before the state District Court having jurisdiction of adjudication of priorities for Water District No. 65 in Water Division No. 1 of the State of Colorado. In the decree of July, 1912, entered by the state court, complainant, as successor to the Colorado corporation, was awarded priority as of April 4, 1890, for its canal for 15 cu. ft. of water per second of time, or so much thereof as might be neces-

sary for the irrigation of lands within the State of Colorado. The court found that it had no jurisdiction to adjudicate any right of priority for irrigation of lands in Nebraska and refused to violate the Constitution, laws and decisions of the courts of the State of Colorado by granting any such decree (R., 3-4; *Lamson v. Vailes*, 27 Colo. 201).

This decree was conclusive upon all water users upon the stream in Colorado, unless appealed from.

Farmers' Union D. Co. vs. Rio Grande Canal Co., 37 Colo., 512, 515;

O'Neil vs. Northern Colo. Ins. Co., 56 Colo., 545; 242 U. S., 20.

During the time the adjudication proceedings were pending before the District Court of Phillips County, Colorado, and on March 1, 1912, The Pioneer Irrigation Company, plaintiff herein, was organized under the Nebraska laws and on March 30, 1912, the Colorado corporation conveyed its canal and appropriations to the new and foreign corporation. The Nebraska corporation appeared befort the state court and participated in the proceedings leading to the decree entered in July, 1912.

Notwithstanding the fact that both the Colorado corporation and its grantee, the Nebraska corporation, had both submitted themselves and their claims to the jurisdiction of the Colorado District Court and participated in said proceedings and their rights were determined and fixed by said decree adversely to their claim for the right to divert water from Colorado for irrigation of lands in Nebraska (R., 4), no objection or exception was entered to said decree by said Colo-

rado corporation or its successor, the Nebraska corporation, and neither of said corporations prosecuted any appeal or writ of error for the review of said decree, and, on the contrary, abided the result of said decree insofar as further proceedings in the state courts were concerned, and said decree was allowed to become final as to both said Colorado corporation and its successor, the Nebraska corporation (R., 4), which, by its conveyance, had merely succeeded to whatever rights the Colorado corporation may have had and was likewise bound by the decree (*McCarter v. Hudson Co. Water Co.*, 70 N. J. Eq. 525, 534).

After the entry of the decree adjudicating and fixing the priority, quantity and rights of the Colorado corporation and its successor, the Nebraska corporation, both of whom were so before the court and bound by the decree, the Nebraska corporation appeared before the State Board of Nebraska having jurisdiction of the adjudication of priorities for the diversion and use of water in that state and obtained from that tribunal an order purporting to confirm in the Nebraska corporation the right to divert water in Colorado for use upon Nebraska lands, although no diversion in fact occurred in Nebraska, and, on the contrary, the diversion works and the first seven miles of the company's canal were in fact located entirely within the State of Colorado. By such order the Nebraska tribunal assumed to award to the corporation the right to divert 77 cu. ft. of water per second of time in Colorado for the irrigation of the lands under the corporation's canal in Nebraska and thereby to control the diversion of the water in Colorado, without its consent, for the irrigation of lands in the neighboring state (R., 5, 15).

Subsequent to the construction of the canal by the Colorado corporation, later conveyed to the Nebraska corporation, numerous small diversions were made along the North Fork of the Republican River and from its tributaries in Colorado above the headgate of said corporation canal. These subsequent diversions were junior in point of time to the corporation's canal, but were constructed for the irrigation of lands immediately adjacent to the stream and from which the greater part of the water so diverted returned almost immediately and flowed down to the headgate of the corporation canal and became available for diversion by that canal, save for that part naturally lost from time immemorial by reason of the natural change of physical conditions in the valley of the stream a short distance east of Wray, Colorado, where the water, theretofore accumulating in the stream, begins to disappear into the sands of the valley (R., 6).

Notwithstanding the fact that both the Colorado corporation and its successor, the Nebraska corporation, had submitted themselves to the jurisdiction of the District Court of Phillips County, Colorado, and had participated in the adjudication proceedings resulting in the decree of July, 1912, and had prosecuted no writ of error or appeal from said decree (R., 4), on August 8, 1913, subsequent to the entry of the order by the State Board of Nebraska above mentioned, the Nebraska corporation filed this suit in the District Court of the United States for the District of Colorado, wherein it sought to enforce and impress upon the territory and waters of Colorado its Nebraska decree without consent of the State of Colo-

rado and over objection of its officials and contrary to the Constitution, laws and decisions of its courts, and sought to compel the executive officials of Colorado (respondent water officials and their successors) to execute the Nebraska decree upon Colorado territory and to distribute the waters of the North Fork of the Republican River contrary to the decree of the Colorado court and to the Constitution and laws of the state.

Various causes of action were alleged, but all, save those hereinafter considered, were either abandoned by the plaintiff or withdrawn and refused consideration by the court at the trial.

The court decreed to the plaintiff, the Nebraska corporation, the right to divert and carry in Colorado a part (29 cubic feet) of the amount claimed (77 cubic feet) for the canal for application on Nebraska lands as of the date for the Colorado portion of the canal as fixed by the District Court of Colorado; enjoined the Colorado water officials from interfering with such diversion, compelled them to enforce the Nebraska Irrigation Board's decree in opposition to claims in Colorado and, in effect, not only expropriated Colorado territory for Nebraska use, but enjoined the Colorado executive officials and their successors from obeying the Constitution and laws of their state in the distribution of the water of the Colorado stream, and commanded them to do and perform certain acts forbidden and to refrain from performing acts directed by the Constitution and laws of Colorado and the decisions of its courts.

Upon appeal to the Circuit Court of Appeals, Eighth Circuit, the decree of the District Court was affirmed.

STATEMENT OF CASE.

A statement of the issues involved might be limited to that portion of the pleadings, proof, and decree of the District Court, bearing upon the question of compelling the executive officers of the State of Colorado, who have charge of the distribution of the waters of the state, to violate the Constitution, laws and decisions of the courts of Colorado, but so to do would confuse rather than clarify the questions now before the court.

The jurisdictional grounds assigned for the decree by the District Court were:

> Diversity of citizenship and
>
> "to obtain redress for the deprivation by defendants, of rights and privileges secured to the complainant by the Constitution and laws of the United States and as a suit arising under the laws of the United States" (R., 27).

The jurisdiction of the District Court to compel the executive officials of the State of Colorado to violate the Constitution and laws of the state and its jurisdiction to entertain a suit and to enter judgment, which, in effect, was one against the state, was challenged both by motions to dismiss and by the answers of the respondents.

During the trial the District Court, of its own motion, withdrew and dismissed all questions "that may be included in the issues herein joined under the pleadings" except that the court decreed the capacity of complainant's canal at the interstate line to

be 29 cu. ft. per second; that water to that amount had been put to beneficial use, as of priority April 4, 1890; that complainant is entitled to divert water in Colorado sufficient to deliver that quantity to the measuring weir at the interstate line for use in Nebraska as of priority April 4, 1890, being the date of priority awarded the canal for its Colorado lands and the date also adjudged to the canal by the Nebraska board for its Nebraska land and, further, that the official defendants and their successors in office be enjoined from treating the complainant otherwise than it would be treated if the canal were wholly within the State of Colorado, and all lands irrigated therefrom were in said last-named state. While the District Court dismissed all issues involving charges of violation of the Colorado law by the water officials the court did, however, impress, to the extent of 29 cu. ft. per second, the Nebraska decree (void upon its face) upon the Colorado stream without the consent of Colorado and contrary to its laws and the decisions of its courts; in effect enjoined the Colorado executive officials from carrying into effect the Constitution and laws of their state and, on the contrary, compelled them to violate such Constitution and laws, although the same were not construed by the court or found to be in conflict with the Constitution of the United States (R., 27-29).

Under these circumstances, it is necessary to set forth at considerable length the issues presented by the pleadings, the proof and the final disposition of the case by both the District Court and the Circuit Court of Appeals.

(1)—The Pleadings.

(a)—Bill of Complaint.

(Record, pp. 5-6).

Complainant, The Pioneer Irrigation Company, filed its bill of complaint in equity in the United States District Court for the District of Colorado, August 8, 1913, against:

> "John E. Field, as State Engineer of the State of Colorado;
>
> "Filmore Cogswell, as Division Engineer of Irrigation, Division No. 1, of the State of Colorado;
>
> "Dwight L. Bower, as Water Commissioner of District No. 65 of Irrigation, Division No. 1, of the State of Colorado."

Complainant also joined as respondents F. D. Johnson, William Pyle, J. B. Cunningham, C. A. Patton, Frank W. Pickett, J. J. Cassin, R. M. Reed, William Heindal, W. E. Wolfe, George Short, Pierce Miller and S. W. Seward, citizens of Colorado, as the owners of appropriations of water in said state.

After alleging the jurisdictional amount involved, it was alleged that the suit:

> "Is brought to obtain redress for the deprivation by defendants, under color of the laws and statutes of the State of Colorado, of the right and privileges of the complainant, secured to it by the constitution and laws of the United States, providing for the equal rights of citizens of the United States

and of persons within the jurisdiction of the United States, to carry on commerce between the State of Colorado and the State of Nebraska, and particularly the right of the complainant to divert water, and to transport, carry and sell the same to citizens of the State of Colorado and the State of Nebraska for agricultural and domestic purposes";

That complainant was a corporation organized under the laws of the State of Nebraska on March 1, 1912, for the purpose of purchasing, owning, constructing and maintaining reservoirs and ditches, and particularly to own and operate a ditch known as The Haigler Land and Canal Company's Ditch, which said ditch it purchased, together with all rights, appurtenances and franchises, March 30, 1912, and that complainant is the owner of said ditch;

That said ditch was and is used for irrigation of lands for domestic purposes, taking its supply from the North Fork of the Republican River at its headgate located on the south bank of said stream in Sec. 2, Tp. 1 N., R. 43 W. of the 6th P. M., Yuma County, Colorado, and that the carrying capacity of said ditch is 92 cu. ft. of water per second of time;

That work was begun on said ditch April 4, 1890; that the same was thereafter constructed and has since been used for the irrigation of agricultural crops by the complainant's grantor, The Haigler Land and Canal Company, a corporation organized and existing and doing business under and by virtue of the laws of the State of Colorado; that water was diverted by said company and that diversion and ap-

plication of 15 sec. ft. had been made on Colorado lands and 77 sec. ft. on Nebraska lands since the construction of said canal; alleged aridity of climate and necessity for irrigation of lands in both states and that 92 cu. ft. per second had been carried and put to beneficial use by ditch for lands in both states, without hindrance until the year the action was commenced;

That prior to July, 1912, a proceeding had been commenced in the District Court of the County of Phillips, State of Colorado, entitled:

> "In the matter of the adjudication of priorities of right to the use of water for irrigation and other beneficial purposes in Water District No. 65, in Water Division No. 1, of the State of Colorado,"

under the statutes of the State of Colorado, providing for statutory proceedings to settle all questions concerning priorities of appropriation of water, under and pursuant to Sections 3276 and 3290 of the Revised Statutes of Colorado, 1908, said court being the court having jurisdiction thereof as provided by said statutes; that the complainant and its predecessor, The Haigler Land and Canal Company, and each and every of the respondent ditch owners participated in said proceedings, and that during July, 1912, a decree was duly given, made and rendered adjudicating and settling all questions concerning priorities of appropriation of water between the appropriators of water for irrigation purposes and other beneficial uses from the natural streams and their tributaries within Water District No. 65;

"That the complainant was found by the said decree to be the owner of the Haigler Land and Canal Company Ditch, and was granted Priority No. 6, but the court refused to grant to the complainant, in and by said decree, any water for the irrigation of any land in the State of Nebraska, and only granted to the said complainant fifteen cubic feet of water per second of time, solely for the irrigation of lands within the State of Colorado, claiming and contending that the court had no jurisdiction to adjudicate the right to divert water by means of said ditch for use in the State of Nebraska, and stated in said decree, as follows, to-wit:

" 'And the court further finds that the said The Haigler Land and Canal Company in offering proof tendered proof relating to the diversion of water through said ditch for the irrigation of lands without the State of Colorado and within the State of Nebraska, and upon objection by the other claimants within the State of Colorado the offer of said testimony was denied, and the court found and hereby finds that it had no jurisdiction to adjudicate any right of priority in this proceeding for said lands, or the irrigation thereof, or make other findings with reference thereto, and no other question concerning the same was heard or is hereby determined' (R., 4).

"And the court, in and by said decree, further found, among other things, as follows:

"'No part of this decree shall in any way affect any right, claim or interest to divert water from any of the streams flowing in or through Water District No. 65, into the States of Nebraska or Kansas, so far as the same are used for the irrigation of lands lying in said States of Nebraska or Kansas, or where any ditch diverting water from any of said streams in the State of Colorado shall be used for irrigation of lands lying in said Water District No. 65, and also lands in any adjoining state or states, the decrees herein entered shall be deemed and considered as applying only to priority of right to the use of water upon lands lying and situated in the State of Colorado.'"

Said bill of complaint then alleged the several appropriations decreed to respondent ditch owners, diverting water from the Republican River in Colorado, all, including the complainant's canal, as set forth in the table, page 3 of the Record, which is as follows:

No. of Priority	Name of Ditch	Name of Claimant	Date of Appropriation	Amount of Appropriation
1	O'Donnell	F. D. Johnson	6/ 1/1887	4 cu. ft.
2	Hays Creek	C. A. Patton	3/ 1/1888	3½ cu. ft.
3	Bar Eleven No. 2	Wm. Pyle and J. B. Cunningham	4/26/1888	7 cu. ft.
4	Wray	Frank W. Pickett	10/ 4/1888	10 cu. ft.
5	Laird	S. W. Seward	10/20/1888	12 cu. ft.
*6	Haigler L. & C. Co.	Haigler Land and Canal Company	4/ 4/1890	15 cu. ft.
7	Wray Mill-race	Wray Mill Co.	2/ 1/1892	50 cu. ft.
8	O'Donnell	F. D. Johnson	12/31/1893	2 cu. ft. (Additional)
9	Carroll & Gilmore	C. A. Phillips, W. A. Sharp and F. H. Johnson	1/27/1894	cu. ft.
10	Bar Eleven No. 4	J. J. Cassin	3/19/1894	6 cu. ft.
11	Hays Creek No. 3	C. A. Patton	6/ 1/1894	3½ cu. ft.

12	Chief Creek	R. M. Reed and Wm. Heindel	11/14/1894	6 cu. ft.
13	Olive Creek	W. E. Wolfe	10/12/1898	2 cu. ft.
14	Holy Joe	George Short	3/25/1889	1 cu. ft.
15	Burlington Pipe Line	Chicago, Burlington & Quincy R. R. Co.	5/30/1901	gal.
16	Pierce Miller	Pierce Miller	4/22/1904	2½ cu. ft.
17	F. D. Johnson	F. D. Johnson	8/23/1905	cu. ft.
18	Pyle & Cunningham	Wm. Pyle and J. B. Cunningham	9/18/1911	7 cu. ft.

Further alleged the entry of a judgment and decree in favor of complainant during the year 1913 before the State Board of Irrigation, Highways and Drainage of the State of Nebraska for 77 cubic feet of water per second of time to be diverted and carried by complainant's ditch from its point of diversion in Colorado for the irrigation of lands in Nebraska, as of priority date April 4, 1890; claimed jurisdiction of such matters in said board under the laws of Nebraska; alleged that certified copies of said decree were filed in the offices of the State Engineer of Colorado and the County Clerk and Recorder of Yuma County, Colorado; that under the laws of Nebraska since 1895 the right of appropriation of water in said state is identical with the provisions of the Constitution and laws of Colorado; and alleged compliance with the laws of Nebraska respecting the diversion of water from the natural stream in Colorado and application thereof to beneficial use in Nebraska to the extent of 77 cubic feet of water per second of time and that the value of the canal and water rights exceeds $200,000.00, of which the Nebraska portion exceeds $150,000.00.

Alleged the development and increase in value of Nebraska lands by reason of irrigation from complainant's ditch; that the laws of Colorado require ditch owners to maintain headgates through which water may be measured and the duty of the state officials to require said headgates to be maintained; that the respondent ditch owners have failed to maintain headgates and the state officials have failed to require the same, although demanded by complainant; that demand has been made of the respondent state offi-

cials to allow 92 cubic feet of water to be diverted from the Republican River by complainant's ditch and that said officials have refused to allow more than 15 cubic feet of water per second to be diverted, being the amount adjudged by the District Court of Phillips County, Colorado, to which complainant's ditch is entitled for irrigation of lands within the State of Colorado, and that the respondent state officials refused to recognize the decree of the State of Nebraska or any right in claimant to divert water within the State of Colorado for use and consumption in the State of Nebraska and refused to recognize any right in claimant's ditch to divert such water for carriage into Nebraska, by reason of its alleged use for a period of more than twenty years without question; that respondent state officials did allow respondent ditch owners, junior to April 4, 1890, to divert and apply water without regard to the alleged priority of the complainant for irrigation of Nebraska lands; that ditches with priorities earlier than that of complainant were allowed by respondent state officials to divert more water than they could put to beneficial use, alleging specifically excessive diversions by ditches having earlier dates of priority and owned by individual respondents, and that the water diverted by said ditches could not be measured on account of the failure to install proper headgates and measuring weirs; that the laws of Colorado require respondent state officials to compel ditch owners to install headgates and measuring boxes and that they failed so to do, although demanded by complainant; that for more than twenty years complainant and its grantor have diverted water annually to the amount of 92 second

feet for use in both Colorado and Nebraska, and that no claim or contention of any kind has been made by any person to any part or portion thereof; and that complainant and its grantor during all of said time have carried 77 cubic feet into the State of Nebraska and there applied the same to irrigation.

That by reason of the matters and things set forth, "**complainant says that its rights secured to it by the laws of the United States have been invaded and it is deprived of rights which are safeguarded to it by the Constitution and laws of the United States,**" to its injury and oppression.

Prayer for injunction restraining respondent ditch owners from diverting water until headgates are placed in their ditches; restraining respondent state officials from interfering with the right of complainant to divert 77 cubic feet of water into his headgate (in Colorado) for the purpose of irrigating lands in the State of Nebraska; restraining senior priorities from diverting more water than necessary for the irrigation of the lands under their ditches; requiring respondent state officials to shut down all ditches with priorities later than April 4, 1890, and to allow all water in the Republican River, after allowing a proper amount of water to be diverted by the senior appropriators, to flow into the headgate and ditch of complainant, not exceeding 92 cubic feet per second of time; for costs and other equitable relief.

(Note: It will be observed that complainant makes no charge that by any act or omission of the respondent state officials it is deprived of the use of the 15 cubic feet of water decreed by the state court of Colorado for the irrigation of lands under its canal in

that state or that any of complainant's rights under the Constitution and laws of Colorado to divert and use waters under its canal in that state are violated.

The charge is that the State Board of Nebraska assumed to decree to complainant 77 cubic feet of water to be diverted in Colorado for the irrigation of the lands under complainant's canal in Nebraska as a result of the alleged use made by complainant's predecessor (a Colorado corporation); that the Colorado officials refused to recognize the Nebraska decree and to recognize any right in complainant's ditch to divert water for carriage into Nebraska before supplying users in Colorado or to allow more than 15 cubic feet of water, the amount decreed by the Colorado court for use upon Colorado lands, to be diverted into complainant's ditch as against the claims of other users, senior and junior, in Colorado; and that the official respondents permit junior ditches in Colorado to divert and apply water, after supplying complainant with 15 cubic feet per second for use upon its Colorado lands, rather than to permit complainant to draw 77 cubic feet additional water for transfer out of Colorado for use upon Nebraska lands. There is no charge that failure or refusal to install headgates or measuring weirs had interfered with complainant's diversion and use of 15 cubic feet of water upon its Colorado lands.

As we shall later observe, all such issues were covered by the proof and dismissed by the court.)

(b)—Motions to Dismiss.

The respondent state officials, not confessing the truth of any of the matters and things in complain-

ant's bill of complaint, moved to dismiss the same for the following reasons (R., 7):

1. That the court had no jurisdiction of the subject matter of the action, it appearing by said bill of complaint that the waters of the North Fork of the Republican River in Colorado, sought to be diverted by complainant within the State of Colorado, are the waters of a natural stream of said state and are within its territorial limits and belong to said state and are subject to the exclusive control of the state; and that the official respondents are the agents and official representatives of the state, charged with the exclusive duty of regulating the distribution of said waters for irrigation purposes;

2. Because it appears from the bill that the court has no jurisdiction of the subject matter, in that the action is brought to require the State of Colorado to do and perform, or to refrain from doing and performing, certain acts in the exercise of its sovereign power, and that in such an action the Supreme Court of the United States has exclusive jurisdiction;

3. Because it appears from the bill that the State of Nebraska is a necessary and indispensable party, the bill averring that complainant acquired title to the use of water upon lands in Nebraska by virtue of an award and decree of the authorities of the State of Nebraska, and that the sovereign State of Nebraska is the only party entitled to maintain such an action;

4. Because the court had no jurisdiction of the subject matter of the action, in that the purpose of the bill was to ascertain and determine complainant's rights under the laws of the State of Nebraska to di-

vert waters of the North Fork of the Republican River in Colorado for the irrigation of lands in Nebraska, and to obtain a decree that by such diversion a priority had been obtained over those diverting water from the same river for purposes of irrigation within the State of Colorado, under the laws of said state and under decrees awarded by the court of said state in pursuance of said laws;

5. Because it appears from the bill of complaint that the official respondents have been sued in their representative capacity as officials of the State of Colorado, having charge of the regulation and distribution of water within said state for irrigation purposes, and the action is one in legal effect against the State of Colorado in its sovereign capacity, and the said state is a proper and indispensable party;

6. Because it appears from the bill of complaint that a cause of action is not stated for any relief in equity against the official defendants.

Respondent ditch owners likewise moved to dismiss the bill for the same reasons set forth in the motion of official respondents.

Upon hearing, said motions were denied by the court.

Upon motion to dismiss the bill for failure to join indispensable parties, filed by respondent F. D. Johnson, the complainant was ordered to join as parties respondent the owners of the Carroll and Gilmore Ditch, and The Chicago, Burlington and Quincy Railroad Company's appropriation.

Thereafter the bill of complaint was amended by joining C. A. Phillips, W. A. Sharp and F. H. Johnson, as owners of the Carroll and Gilmore Ditch, and

The Chicago, Burlington and Quincy Pipe Line Ditch as respondents.

The railroad company thereafter appeared and answered in said action as a party respondent. The other respondents named, C. A. Patton, W. A. Sharp and F. H. Johnson, were thereafter served in Nebraska but never appeared, and their failure to appear was brought to the attention of the District Court during the trial (R., p. 23, fol. 40).

(c)—Answer of Respondents.

The respondent state officials and respondent ditch owners, the Burlington Railroad Company, William Pyle, J. B. Cunningham, C. A. Patton, Frank W. Pickett, R. M. Reed, William Heindal and W. E. Wolfe answered as follows:

Admit the allegations of the bill as to the official position of respondents Field, Cogswell and Bower;

Deny the allegation as to jurisdictional amount, or that the action was brought to obtain redress for the deprivation by respondents of any right or privilege of the complainant secured to it by the Constitution and laws of the United States;

Admit that the complainant was organized as a Nebraska corporation at or about the time mentioned in the bill of complaint for the purposes therein stated;

Allege that the complainant is the successor in interest of The Haigler Land and Canal Company, a Colorado corporation;

Admit that the ditch of complainant takes its supply of water from the North Fork of the Republican River in Colorado, and that its headgate is lo-

cated on the south bank of said stream at the point mentioned in the bill of complaint, but deny its capacity to be 77 cubic feet as alleged in the bill, and aver that its capacity is about 20 cubic feet per second of time where it crosses the Colorado-Nebraska State line (see Decree, U. S. Dist. Ct., 29 cu. ft.—Rec., p. 28);

Deny that water had been used in amount and time as alleged in the bill; that the number of acres were irrigated in Nebraska as therein alleged, or that water had been used without let or hindrance for more than twenty years; and aver that the only water diverted by complaint was and had been only the amount of water contained and remaining in the river at the point of diversion after all appropriators in Colorado had diverted and applied the waters of said river for the purposes of irrigation in that state;

Admit the statutory proceedings for the adjudication of priorities in the District Court of Phillips County, Colorado, alleged in the bill, and that by the decree entered therein complainant's ditch was awarded 15 cubic feet of water per second of time, as of date April 4, 1890, for the irrigation of lands in Colorado, and aver that complainant and its predecessor appeared in said proceeding, filed their statement and made proof, and that by the decree the claim for irrigation of lands in Nebraska was denied; that no appeal or writ of error was taken therefrom, and that the terms of said decree was conclusive and binding upon complainant;

That respondents have no knowledge of any proceeding before the Board of Irrigation, Highways and Drainage of the State of Nebraska, or of any judgment or decree in favor of complainant by the same

and aver that any such proceedings were without any force or effect as to respondents, and that said board was without jurisdiction as to respondents or the distribution or diversion of water within the State of Colorado, and that respondents are without knowledge that the laws of Nebraska after 1895 are similar to the laws of Colorado, regarding the diversion of water for irrigation, and deny that compliance with the laws of Nebraska conferred any right upon complainant to divert water from the natural streams of Colorado;

Deny the value of the ditch and water rights of complainant as alleged, or that the lands under the ditch in Nebraska were settled and developed upon reliance of water therefrom;

Aver that respondents' ditches are supplied with headgates, but admit that some are without measuring weirs, and deny that respondents have refused or neglected to construct measuring weirs, and say that the amounts of water diverted by the respondents are so small that the same may be accurately ascertained without measuring weirs, and that the said officials controlling distribution have not ordered or directed the construction of any such weirs, but that the state officials controlling the distribution of water owe no duty to the complainant, except the duty to supply it with water to the amount of 15 cubic feet of water per second of time for use upon lands in the State of Colorado, and that said amount has at all times been supplied;

Admit that the official respondents have refused to allow complainant to divert water from the North Fork of the Republican River in excess of 15 cubic feet per second of time when water was required by

other decreed appropriators in the State of Colorado, and allege that they were justified in so doing by the decree theretofore entered by a court of competent jurisdiction in the State of Colorado, adjudicating the priorities between the various ditches in said state, in which proceedings the complainant and its predecessor participated, and that by virtue of the laws of the State of Colorado and under their oaths of office, the official respondents are absolutely required to distribute the water of said stream in accordance with said decree; that the demand made by complainants upon the official respondents constituted a demand upon them to violate their duties and oaths of office and was accordingly refused, and that official respondents refused to recognize any decree in the State of Nebraska, or the right to divert water within Colorado for use in Nebraska, by reason of the fact that the same is in violation of the laws of Colorado and the decree governing the distribution of water by such official respondents;

Admit that the canals of certain answering respondents and others are junior to the appropriation for 15 cubic feet decreed to complainant's ditch; deny that ditches having senior appropriations to complainant's ditch, as provided by said decree, divert more water than they put to a beneficial use, or that water is wasted, or that any of the junior ditches are permitted to divert more water than is beneficially used, and deny that any water so diverted is wasted, or that any of said ditches divert more water than their appropriations;

Admit that, under the laws of the State of Colorado, the official respondents are required to enforce the decrees of its courts and to deliver water accord-

ing to said decrees, and allege that said respondent officials have fully observed the law and have distributed water in accordance with the decree of the District Court, and allege that the predecessor in interest of complainant ceased to operate and maintain complainant's ditch and abandoned the same for the diversion of water into the State of Nebraska for many years, and until shortly prior to the commencement of this action, and that all water diverted by said ditch was used upon lands in Colorado;

Deny that any rights secured to the complainant by the laws of the United States have been invaded or that it has been deprived of any rights safeguarded by the Constitution and laws of the United States.

For a further defense respondents affirmatively alleged:

That the North Fork of the Republican River is a natural stream, arising within and flowing through the State of Colorado; that the official respondents are required by the laws of Colorado to distribute the waters of the natural streams within said state according to the laws of the state and the decrees of the courts thereof, and that complainant and individual respondents, as owners of ditches within the state, are subject to the laws of Colorado;

Allege that prior to the commencement of this action a proceeding was commenced in the District Court of Phillips County, Colorado, the court having special jurisdiction of the adjudication of priorities in Water District No. 65 of said state, for the settlement of all questions concerning the priority of appropriations of waters diverted from the North Fork of the Republican River and its tributaries in said state and all other questions of law and of right grow-

ing out of or in any way involved or connected therewith, and that in said proceeding the complainant herein, through its predecessor in interest, and the respondent ditch owners and other claimants, filed their statements of claim and offered their respective proofs;

That claim was made in said proceedings by complainant through its predecessor for the right to divert water from the North Fork of the Republican River for the irrigation of lands in Nebraska, and that all matters of law and questions of fact involved in and connected with said claims, so made before said court, were therein determined;

That no appeal or writ of error to the decree entered by said court was ever made or taken by any of the parties to said proceedings; that said decree remains in full force and effect, and that by said decree there was adjudicated to complainant's ditch a priority of 15 cubic feet of water per second of time, of date April 4, 1890, and no more;

That complainant demanded of official respondents water in the amount fixed by said decree, and that said amount of water was delivered unto complainant, as by said decree required, and respondents say that this action is brought to compel the official respondents to distribute water to complainant's ditch, contrary to the terms and provisions of said decree and contrary to the official duties of official respondents and the laws of the State of Colorado; and respondents say that by reason of the facts aforementioned, the complainant is estopped from maintaining this action; that said matters have been adjudicated and determined by a court of competent jurisdiction and that said decree is **res adjudicata** as

to the complainant and all parties thereto, and that this action, insofar as it seeks to compel official respondents to distribute water to said ditch for use in Nebraska, seeks to violate the decree of a court having jurisdiction of all questions of law and of right connected with and involved in the adjudication and determination of priorities of appropriations for irrigation purposes between ditches drawing water from the North Fork of the Republican River in Colorado, and to compel and require these official respondents to violate their duties as state officials under the laws of Colorado relating to the force and effect of such decree.

Respondents further affirmatively alleged:

That the North Fork of the Republican River is an innavigable natural stream, arising in the State of Colorado, and that under the laws of the State of Colorado and of the United States, the State of Colorado owns and controls the waters of said stream for the purpose of distribution and use thereof, for irrigation and other beneficial purposes within the state;

That by virtue of its law-making powers as a sovereign state, long prior to the commencement of this action, through its legislative bodies, it enacted certain laws for the control and distribution of the waters of the natural streams within the state, including laws providing for the appointment of certain state officials to control and distribute the waters according to the laws of the state, and that the official respondents named herein are the state officials provided by said laws, and are charged with the exclusive duty of regulating the distribution of the water of the natural streams of the state, including the North Fork of the Republican River, and that this action is

brought to require said official respondents, in the exercise and carrying out of the sovereign powers of the State of Colorado, to do and perform, or to refrain from doing and performing, certain acts constituting an exercise of such sovereign powers and in obedience therewith, by reason whereof the State of Colorado is a necessary and indispensable party and the court is without jurisdiction in the premises.

Respondents further affirmatively alleged:

That the North Fork of the Republican River is an innavigable natural stream in the State of Colorado, and that under the laws of Colorado and the United States, the State of Colorado controls the waters of said stream for use and distribution for irrigation and other beneficial purposes within said state;

That under and by virtue of its law-making powers as a sovereign state, long prior to the commencement of this action, through its legislative bodies, it enacted certain laws for the control and distribution of waters of the natural streams of this state for beneficial purposes, including irrigation of the lands lying within said state, and certain laws providing for the appointment of certain state officials to control and distribute the waters for such beneficial uses according to the laws aforesaid; that the official respondents named herein are the said state officials charged with said exclusive duty of regulating the distribution of water from the natural streams of the state, including the North Fork of the Republican River, for irrigation of lands within the State of Colorado;

That the respondent officials have at all times caused the waters of the North Fork of the Republican River within the State of Colorado, diverted from said

stream for irrigation of lands lying within said state, to be distributed in an economical manner and without waste, for the purpose of preserving a flow of water in the natural stream to the full extent that the same could be preserved, subject to beneficial use within the state; and that at no time has there been diverted more than a just and equitable proportion of such water;

That official respondents are clothed with no power to distribute water from said stream to users and consumers thereof upon lands without the State of Colorado; that neither has the State of Nebraska any power or authority, by virtue of its laws, to control the diversion of water within the State of Colorado for users and consumers thereof upon lands in the State of Nebraska; that the laws of the State of Nebraska are not the same as the laws of the State of Colorado, the State of Nebraska recognizing riparian rights, including the right to irrigate riparian lands, regardless of the time when the waters of the stream are applied to the irrigation thereof, except such riparian lands as were acquired from the United States subsequent to the year 1889; that by reason thereof the distribution of water from interstate streams for the irrigation of riparian lands, as between consumers and users thereof in different states, when adjudicated in a court of equity of the United States, is controlled and determined, when affecting those using the same upon riparian lands, in accordance with the principles of equity, so as to secure a fair and equitable distribution of the waters of such stream, regardless of time of diversion and application thereof;

That each and all of the respondents, other than said official respondents and the respondent railroad

company, are the owners of riparian lands along or through which the said North Fork of the Republican River has ever been wont to flow and that they and their predecessors in interest were such owners under grant from the United States long prior to the construction of the ditch of complainant and prior to the year 1889, and possessed with said lands the right to use and enjoy the same to the full extent permissible to owners of riparian lands as recognized by the common law and as modified and made applicable to the arid portions of the United States, which riparian right included the right to use an equitable portion of the waters of the stream for the irrigation of such riparian lands, except as the laws of Colorado gave preference and priority to other users within the State of Colorado by reason of prior beneficial application of said waters, and that each and all of said respondents' ditches within the State of Colorado are used for the irrigation of such riparian lands lying along and immediately adjacent to the said North Fork of the Republican River, and that the water distributed and diverted by said ditches speedily returns to the stream, except as consumed by plant life and by evaporation necessarily resulting from irrigation; that the flow in the stream is not greatly diminished by such diversion and application, and that the waters would and do flow out of Colorado and into Nebraska were it not for the ditch of complainant diverting water in Colorado for the irrigation of Nebraska lands, it being the last ditch on said river in Colorado except one small ditch securing only return flow below the dam of complainant; that only a fair and just proportion of the flow of water in said stream is consumed and exhausted in Colorado wholly upon riparian lands,

and that said water drains back into said stream and leaves a fair and just proportion of said water for the consumers thereof in Nebraska and that the use of waters on said riparian lands in Colorado is economical and without waste and should not in equity and good conscience be interfered with.

Respondents further affirmatively alleged:

That the North Fork of the Republican River has a length of approximately eighteen miles within the State of Colorado and that it arises from and is fed by a number of springs occurring along a portion of its length within said state; that its length in Nebraska is approximately twenty-four miles and that throughout its course in that state it naturally and speedily dwindles away owing to the absorption of water by the soil through which it flows, so that near the end of its course, under natural conditions, it carries no water except during occasional and irregular floods; that the stream throughout its course in Colorado is confined to a narrow valley with high bluffs on each side; that irrigation from the stream in Colorado is confined to this narrow valley and that nowhere is water taken to a distance in excess of approximately one-fourth of a mile laterally from the thread of the stream; that the slope and natural trend on each side is toward the stream, and that, because of topographical and geographical conditions, water used for irrigation returns almost at once and with but slight diminution to the stream; that, because of this seepage and return water to the stream, the use of water for irrigation on the upper reaches of the stream enables far more land to be irrigated and a greater economical return for the general good to be obtained therefrom, and that the waters so used return to the stream,

except as slightly diminished by plant life and evaporation, and flow down said stream to the dam of complainant for diversion by complainant's ditch and that these conditions permit of the irrigation of a much greater area of land than could be irrigated were these respondents required to allow said waters to flow to the headgate of complainant's ditch without previously applying the same to any beneficial use, as sought by the bill of complaint herein; that if the water is not used upon the upper reaches of the stream far less land will be brought under irrigation, with the result that there will be a material loss of the benefits to be derived from the use of water, and, that the appropriators of water from the stream for irrigation in Nebraska are not injured by the diversions in Colorado.

Further answering respondents affirmatively alleged:

That respondents, C. A. Phillips, W. A. Sharp and F. H. Johnson, are indispensable parties to the action, being the owners of the Carroll and Gilmore Ditch in Colorado, having priority No. 9, of date January 27, 1894, of 3½ cubic feet of water per second of time, and that said respondents at the time of the commencement of the action and ever since, were and still are citizens of the State of Nebraska, residing in said state; that under the laws of Colorado no priority of right to divert water for irrigation of lands without the state is permitted or recognized to the citizens of Colorado; that the citizens of any other state are given the same rights as claimants of priorities for use of water within Colorado as are the cititzens of its own state; nor do respondents interfere with the right of complainant to divert waters

under the laws of Colorado; nor do they interfere with any right of complainant to transport, carry and sell water to citizens of Nebraska.

By reason of each of which matters aforesaid, this court is without jurisdiction in the premises.

(2)—Trial of Cause.

(a)—Complainant's Evidence.

Upon the trial the complainant proved the location of his ditch; introduced evidence tending to prove the amount of land irrigated therefrom in Nebraska and the use of water, when obtainable, for irrigation of Nebraska lands; testimony tending to show the failure of obtaining water for such purpose by reason of diversion by other ditches, including the ditches of respondents, and the location of ditches and lands and the amount of land irrigated in Colorado; and some proof of tending to show waste of water by certain senior and junior ditches and other matters alleged in the bill (R., 14).

Complainant also offered testimony regarding the carrying capacity of its ditch, showing a measurement of the waterflow therein to be 33 cubic feet per second by a scale or rating of the flume at the interstate line, and to be 30 cubic feet per second by meter measurement taken in June, 1914, when the ditch was carrying its full capacity. Other witnesses of complainant testified to greater amounts but obtained their knowledge by rough measurements or by assisting others (R., 14).

Complainant's proof also tended to show that all of the water which was allowed to flow into Nebraska through its canal was beneficially applied, and

that construction of the ditch began April 4, 1890, and was completed with reasonable diligence; that the normal flow of water in the North Fork of the Republican River, when no ditches were diverting water, was approximately 56 cubic feet of water per second of time.

Complainant offered in evidence its Exhibit T containing: A certified copy of the statement of claim made by complainant for use of water for irrigation in Nebraska, filed with the State Board of Irrigation, Highways and Drainage of Nebraska; a hearing before said board, and a decree of 77 cubic feet of water per second of time for irrigation of lands lying under the complainant's ditch in Nebraska from waters of the North Fork of the Republican River diverted in Colorado. Said proceedings show no service or attempted service of notice on any of the respondents, other than by publication of notice in the State of Nebraska.

Respondents objected to the introduction of the Nebraska proceedings and decree as not affecting the rights of respondents, but did not object to its being introduced to show what claims complainant had made in Nebraska. The exhibit was admitted, over objection, to which ruling of the court respondents then and there excepted.

Complainant also introduced the map, Exhibit A (Record, p. 43), showing the location of ditches and lands irrigated from the complainant's and respondents' ditches.

(b)—Respondents' Evidence.

Respondents' evidence relative to the capacity of complainant's ditch at the interstate line con-

sisted of the testimony of two engineers. One testified to a meter measurement at the flume of the state line taken in November, 1914, when the ditch was running dangerously full in its then condition and which showed 24.01 cubic feet of water per second of time flowing in the canal at that point. The other engineer testified to meter measurement of the water flowing in the same flume in July, 1914, when the ditch was running in excess of its actual safe-carrying capacity and which showed 21.4 cubic feet per second of time. Respondents' testimony also tended to show that less than the capacity of the ditch was beneficially applied for irrigation of lands within Nebraska, and that water had not been used when available for the irrigation of such lands until shortly prior to the commencement of the action (see U. S. Dist. C't. decree, 29 cu. ft., instead of 77 cu. ft. decreed by the Nebraska tribunal, Rec., p. 28).

Respondents' testimony tended to prove that the normal flow of the water in the river, when no water was being diverted by any ditches, was approximately 45 cubic feet per second of time.

The testimony of both parties showed that ditches having priority numbers 1 to 5 inclusive, 7 to 15 inclusive, and 17 to 18 inclusive (as set forth on the table hereinbefore appearing in discussion of the pleadings), diverted water, in the quantities specified in said table, above the headgate of complainant's ditch (No. 6) and that priority number 16 diverted but two and one-half cubic feet per second at a point below complainant's headgate, but obtained water only from return flow in the stream resulting from the seepage from complainant's canal and land served thereby.

Two witnesses on behalf of respondents testified that they were familiar with the North Fork of the Republican River **prior** to the construction of any ditches, and that the normal and natural flow of the river greatly diminished below the town of Wray, owing to the nature of the soil and quicksand in the bed of the stream; that there was a marked loss of waterflow four and one-half miles below Wray, and that at eight and one-half miles below Wray, near the interstate line, the loss of water was considerably more; that only about one-half of the amount which passed the bridge at Wray naturally crossed the interstate line, although several small feeders or tributaries emptied into the stream. Both witnesses testified that in summer the flow of the stream disappeared entirely near Benkelman, Nebraska, thirty-eight miles east of Haigler, Nebraska. Neither of the witnesses was an engineer or able to state in cubic feet the quantity of water flowing at the different points.

Respondents' witnesses testified to the large return of the water to the stream after diversion by several ditches above the town of Wray, and that the flow of the stream in that section resumed its normal condition a few days after each diversion and application to lands for irrigation; and, that the water was used without waste in Colorado. These witnesses also testified to the topography of the country around the headwaters of the North Fork of the Republican above Wray, in support of the allegations of respondents' answer (R., 17).

In support of the defense set forth in respondent's answer, concerning the riparian rights of respondent Colorado ditch owners as against users of

water in Nebraska and the claim of complainant to the use of water for the irrigation of Nebraska lands, respondents offered their Exhibit 1, the same being a list of the lands, described by sub-divisions, setting forth the issuance of final proof by the United States Land Office, the date of patents and to whom issued, as shown by the certificate of A. F. Browns, register of the United States Land Office in the Sterling Land District, in which the North Fork of the Republican drainage area in Colorado is located.

The list so certified describes 4,360 acres, by legal subdivisions, upon which final certificate, receiver's receipt or patent were given prior to 1889 (the year when Nebraska passed her first appropriation act—60 Neb., 754), the subdivisions therein being all shown in complainant's large legend map, Exhibit A. These lands were identified by one of the engineers for respondents, who had surveyed the same and who stated that each forty-acre tract mentioned in the list was touched by the Republican River and its tributaries, and respondents offered, in connection with the offer of Exhibit 1, to adopt Exhibit A of complainant for the purpose of showing what forties described in the list, Exhibit 1, were riparian to the Republican and its tributaries.

Complainant objected to the introduction of Exhibit 1 on the ground that it was incompetent, irrelevant and immaterial, but did not object to its incompetency on account of the certificate not being in every way sufficient, or that the form in which the proof is offered is not sufficient. Upon request by the court, respondents stated that the purpose of the proof was to show that respondents, or their predecessors in in-

terest, were riparian owners prior to 1889 of the lands irrigated by them.

The court stated that the Nebraska decree adjudicating rights to water for irrigation under complainant's canal in Nebraska must be recognized as the basis of the Nebraska right, otherwise full faith and credit would not be given to it; that respondents had their hearing at the fixing of priorities by the decree in the Colorado court, which gave the complainant's canal priority No. 6 for use of water in Colorado only; that the testimony showed the same condition as to diversion and use on lands in Nebraska and that it saw no escape from the proposition that the users in Nebraska were entitled to the same priority as the users in Colorado, and that the only question left was whether the users in Nebraska had a right to divert water at all for irrigation upon the ground of giving full faith and credit to the decree entered by the Nebraska board.

Respondents offered to prove that the lands described in their Exhibit 1 were riparian to the North Fork of the Republican River in Colorado; that the Republican River touches or runs through the forties therein named; that the lands therein described are owned by the individual respondents who filed answer in the case and are the lands under the ditches of respondents and are irrigated thereby. Also to prove that the use of water upon such land is economical and without waste; that, on account of their proximity to the banks of the stream and the porosity of the soil, only a small portion of the water diverted was lost and that the balance returned to the natural stream for the benefit of lower riparian owners and appropriators. Complainant renewed its objection to the offer, except as to that part of the proof offered

to show return of waters to the stream. The objection was sustained and respondents excepted.

(Note.—The riparian law prevailed in Nebraska prior to 1889—See Appendix Part V, also Crawford Co. vs. Hathaway, 60 Neb. 754. If, in effect, the Colorado line is moved easterly so that the Nebraska lands may avail themselves of Colorado water for irrigation under the Colorado rule of priority—which was the effect of the decision of the district court by enjoining the officials "from treating complainant * * * otherwise than it would be treated if said canal were wholly within the State of Colorado"—then the converse of the rule should equally apply and the Colorado riparian lands which had gone to patent prior to 1889 should be put upon equal footing with the riparian lands in Nebraska which would thereby entitle them to the use of water in preference to the canal. If Nebraska may invoke the Colorado law for her citizens Colorado should be permitted to invoke the Nebraska law for her citizens.)

Respondents then identified their Exhibits 2 and 3 (R., 45) showing the waterplane and ground surface on both sides of the Republican River above Wray and at Wray, Colorado. These exhibits were admitted in evidence and the proof tended to show return of waters to the stream. These exhibits were accompanied by testimony showing the topography and geological formation favorable to quick return of waters to the river.

Respondents, after identification and proof of accuracy, offered their Exhibit 6 (R., 47), showing the total acreage of land irrigated from the North Fork of the Republican River in Colorado by Colorado ditches, including those subsequent to April 4, 1890.

On objection, respondents stated that their purpose in offering the exhibit and testimony and other exhibits was to make proof of use and re-use of water in Colorado, treating the valley as a whole; to show the relative use of water on the upper reaches of the stream, its economy of use and the return flow therefrom, and as tending to show that the use of water, even under all priorities in Colorado, results in a return of water to the stream in as great a quantity as topographical and geological conditions permit; to show that above Wray practically all waters return directly to the stream; that below Wray some two or three miles, the character of the stream changes and that there is a constant and increasing loss in the flow of the stream due to the fact that the water table on the south side of the stream is lower than the stream itself and that the surface of the land in that vicinity is lower than the stream and that a considerable part of the water, if not used at all in Colorado, would not reach the headgate of complainant's canal by reason of these natural conditions. (See Respondents Exhibit 7, R., 49.)

The court held that if the users in Nebraska under complainant's ditch are given the same priority as users under the same ditch in Colorado, which it was inclined to do, that it could not see that the court was concerned in the manner in which the water might reach the head of complainant's ditch and that if the water was there, it would be entitled to it against all subsequent appropriators; that the water users in Colorado under complainant's ditch, having been given Priority No. 6, the water users in Nebraska should, in the court's opinion, be given the same priority; that it is contended by respondents that the users of water

in Nebraska are not entitled to water under Priority No. 6, but that the water of the stream in Colorado belongs to the people of Colorado, and the decree, in event it is in favor of complainant, would go no farther than to adjudicate them a right to the use of water in the amount that they have heretofore put to a beneficial use as of Priority No. 6. The objection was sustained. Respondents excepted.

Respondents again offered Exhibit 6 (R., 47) for the purpose of showing that the total amount of land irrigated under the ditches of respondent canal owners is in excess of the amount testified to by complainant's witnesses. This offer was excluded by the court because the evidence offered by complainant, and sought to be rebutted, was received only as proof that the respondent state officials had ignored the rights of the Nebraska landowners and had refused to turn water into complainant's ditch for their benefit. Respondents excepted.

Respondents further offered the exhibit as a basis to make intelligible the proof of the return of waters to the stream above the point of intake to complainant's ditch, in support of respondents' defense in their answer that an equitable portion of the flow of the Republican River is received by the Nebraska users. Objection was sustained and respondents excepted.

It is then agreed between complainant and respondents that, without specific questions being asked and objection made thereto, the respondents may make a written offer to prove by the witness then on the stand, and other witnesses, the matters and things contained in said offer in writing, and that no contention would be made in the appellate court that specific questions were not asked, the witness then on the

stand being an engineer representing respondents in said cause. Said offer in writing was as follows:

"Defendants offer to prove:

"First. That there is a very heavy return flow to the North Fork of the Republican River from seepage and run off from irrigation of Colorado lands.

"Second. That each of the Colorado ditches has adequate headgates and measuring devices.

"Third. That the Colorado ditches divert water to the amount of their respective appropriations where the capacity of the stream permits it, and that the same is used for necessary irrigation of the lands lying under the ditches without waste, and this offer is made as to all ditches having priorities superior and prior to the Haigler or Pioneer canal as well as to those subsequent in time of appropriation.

"Fourth. That the normal stream or surface flow of the North Fork of the Republican River at the headgate of the Pioneer dam, without any diversion above that point whatsoever, is only 45 cubic feet per second and is practically constant in the absence of heavy storms, and that the same is a less quantity than that flowing in the stream at and also above the town of Wray, Colorado, under like conditions, but, however, the water is not lost, but contributes to the underflow which, on account of the topography of the country, adjacent to the stream easterly

to the Colorado-Nebraska state line, irrigates large areas of land in the State of Nebraska with the result that the State of Nebraska enjoys a greater use of the waters of the stream arising in Colorado than does the State of Colorado and appropriators thereunder.

"Fifth. That by reason of the diversion of water by the Colorado ditches in the amounts heretofore diverted and enjoyed by them, the run-off of the stream during the periods of flow greater than normal is conserved and stored in the soil and by reason of seepage and return flow therefrom augments and increases the normal flow of the stream at the Pioneer headgate.

"Sixth. Irrigation on the upper reaches of the stream is the highest and most economic use of water where irrigation is required and results in the conservation of the supply and the irrigation of a greater amount of land in the states of Colorado and Nebraska jointly.

"Seventh. That Colorado is the apex of the continent and furnishes water to lower states in every direction; that it contributed to the State of Nebraska through this and other streams more than 300,000 acre feet per annum and received no water in return, and that in Colorado, successful agriculture is possible only through the aid of irrigation, while in Nebraska irrigation is not necessary throughout the larger portion of the state.

"Eighth. That there is one ditch heading at or near the town of Wray, used for power purposes, with an appropriation of 50 cubic feet per second, owned by the Wray Mills Company, a Nebraska corporation, not a party to this action, and that said mill race is prior in time of appropriation to some of the ditches diverting water from the stream or its tributaries above the point of the headgate.

"Ninth. That neither the State of Nebraska nor the Pioneer ditch has made any attempt to utilize or to store the water flowing in the stream during the non-irrigating season, although reservoirs to conserve such supply are feasible for the use of lands under the Pioneer canal as well as other lands within the State of Nebraska, but that such reservoirs are not possible within the State of Colorado because of the diversion of water by the mill race at all seasons of the year.

"Tenth. That the total amount of land actually irrigated in Colorado from the North Fork of the Republican River is 3,341 acres, of which 810 are under the Pioneer canal.

"Eleventh. That because of the difference in the character of the soil in Colorado from that in Nebraska under the Pioneer Canal, more water is necessary both for the diversion and application in Colorado than under the Pioneer, but the return is larger and more rapid and that this return is largely due to the stream and available for use at the Pioneer dam and that the actual consump-

tive use is practically the same for both areas."

In connection with paragraph four of the foregoing offer of proof, the respondents offered their Exhibit 7, consisting of blue prints, showing cross-sections of the Republican River below Wray, Colorado, made by respondents' engineer from surveys and showing cross-sections of the valley with the water plane and ground surface, and tending to show loss of water from the stream by reason of the fact that the bed of the river is higher than the adjacent lands and also on account of the geological formation designated and shown in the exhibit. Objection sustained and respondents excepted. (See Respondents' Exhibit 7, p. 49 of Record.)

Respondents then offered their Exhibit 8, in connection with paragraphs three and ten of their "offer to prove," which was admitted.

The court held that it would not consider the offer made by respondents to show that senior ditches were using only the amount of water necessary for the irrigation of lands lying under the ditches and without waste, as the decree would only fix the relative priority of the complainant's ditch and would not attempt to control the administration of the same, as complainant would not be precluded thereafter from raising the question of prior appropriators diverting more water than they were entitled to divert; that the court would simply fix the status of complainant's ditch and embody in the decree a provision that no other questions involved in the case have been considered or would be determined, but were left open for further consideration in any other litigation that might arise.

Respondents then offered to prove by witness on the stand that the owners and claimants of the Carroll and Gilmore Ditch were, at the time of the commencement of the action and ever since have been, residents and citizens of the State of Nebraska, being the same state as that of complainant. Complainant admitted that such was the fact, but objected as immaterial **for the reason that the jurisdiction of the court did not depend on diversity of citizenship.** It was held by the court that the facts admitted would not affect the jurisdiction of the court. Respondents excepted.

(3)—Findings by the Court.

Thereupon, upon the foregoing pleadings and evidence, the court found (R., 24):

> "On the capacity of the ditch I put the greater weight on the testimony of Mr. Toner in reaching a conclusion; I do that for several reasons: First, as to the time of the irrigation season in which he took his measurements, his repeated measurements; his familiarity with the ditch and the water carried by it, his apparent ability concerning such investigations in gathering data in relation thereto; his apparent fairness in order to try to get the true facts and state them in court as a witness. His testimony is somewhat corroborated by that of Mr. Larned, although it does not appear he is as definitely familiar with the ditch of late years as Mr. Toner's evidence indicates.
>
> "I discount Mr. Toner's higher figures for the reason that Mr. Wortham, who also

measured the ditch, apparently spoke with the purpose to ascertain and disclose the true facts, but I think his figures should be raised some on account of the lateness of the season at which he took measurements, being at a time when the necessary results of the irrigation the preceding summer had caused the ditch to be somewhat obstructed and filled up; and with that deduction from Mr. Toner's maximum of 55, and believing that Mr. Wortham's maximum of 45.48 is not high enough, I fix plaintiff's carrying capacity at the headgate at 50 second feet.

"Mr. Toner testified that the carrying capacity at the measuring weir at the state line was 30 second feet; that he had seen it higher than that; carrying more than that on three other occasions during the time he was there investigating the matter, and that at one time it carried as much as 34.8 second feet, and that the ditch did not overflow.

"Mr. Wortham testified that his measurements at the state line on November 1st, were 24.1 feet. The same reasons apply to his measurements as at the headgate. I think that should be increased. So I fix the carrying capacity of the ditch at the state line at 29 second feet. Without mentioning the several reasons that lead me to do so, I am not disposed to give the testimony of Mr. Woodhall as much weight as that of Mr. Toner or as that of Mr. Wortham.

"There are a good many reasons that operate in my mind in placing the lesser weight

to his testimony. Some of them apparently, he is not responsible for. It appears that his superiors directed him not to co-operate with Toner, or have anything to do with Toner, in jointly measuring the flow. That is quite a remarkable coincidence. One looking at that sort of a situation naturally gains the impression that Toner did not only feel confident that his measurements are right, but that he wanted to get right, and was willing to go with a representative of the other side of this litigation and co-operate in getting the true facts. That was denied to him; denied by Woodhall, not of his own motion, but because—as the testimony discloses—he was ordered by his superiors who represented the defendants in this case not to co-operate with him. That may not be of as great significance as other facts disclosed with reference to the condition of the dashboards on the sand box or waste box below the upper measuring weir where Woodhall made some measurements at the time he did so.

"I will also find that this complainant, or the land owners using water under the ditch of the complainant, situate in Nebraska, used and applied to beneficial purposes since the construction of the ditch, the capacity of the ditch whenever they could receive it and it was not denied to them by those in Colorado who controlled the intake, in the irrigation of lands, without waste and for useful and beneficial purposes. They

are entitled to that amount as their appropriations, measured by what flows through the measuring weir at the state line to the capacity of the ditch at that point fixed at 29 second feet, and that their priority is the same and of the same date as that fixed by the state court in the water adjudication, wherein it was determined the users under that ditch in Colorado were entitled to priority No. 6.

"Any other question that may be included in the issue joined, or may be thought to be included by counsel in the issue joined, under the pleadings, is not considered or determined, but left open for consideration and determination in any controversy hereafter that may arise, and a decree may be prepared in accordance with these findings."

Respondents excepted to the findings and each and every of them, and the court directed preparation of decree and assessed costs, which would go against all of the respondents including the official respondents).

(4)—Motion to Retax Costs.

Prior to the presentation and signing of the decree, respondents moved to retax the costs in the case and also to tax the costs against the complainant, for the reason that it appeared that all questions, except fixing the relative status of the complainant as to its priority of right to the use of water, were neither tried nor determined; that as shown by the

allegations of the bill, complainant sought an injunction for 77 cubic feet of water per second of time for consumption in Nebraska, and that it had been found that it was entitled to 29 cubic feet only, and that the defense by the respondents had prevented an abnormal demand upon the supply of water available for irrigation; that the state officials were being mulcted in costs for the performance of their duties under the laws of the State of Colorado; and that the ditches, admitted to have senior rights to the complainants, were mulcted in costs without being permitted to prove that they were not wasting water or using water in excess of their senior decrees.

Motion to retax the costs was denied and exception taken.

(5)—Decree of District Court.

Thereupon the court entered its decree, to which decree respondents then and there excepted, and which, omitting title, is as follows:

> "This cause came on to be further heard at this term and was argued by counsel; and thereupon, upon consideration thereof;
>
> "It is awarded, adjudged and decreed as follows, viz.:
>
> "That the matter in controversy herein exceeds, exclusive of interest and costs, the sum or value of $3,000.00.
>
> "That the requisite diversity of citizenship existed at the time of the bringing of this suit, and that this suit was brought to obtain redress for the deprivation by defendants of rights and privileges secured to the

complainant by the Constitution and laws of the United States, and as a suit arising under the laws of the United States.

"That the complainant is the owner of that certain canal known and called the Haigler Canal or the Pioneer Canal, the headgate of which is located on the south bank of that certain natural stream known as the North Fork of the Republican River in the southwest quarter of the northeast quarter of section two (2), township one (1) north, range forty-three (43) west of the sixth principal meridian, Yuma County, State of Colorado, at a point 1,390 feet west, 44 degrees 30 minutes north of the quarter section corner between sections one (1) and two (2) in said township and range, which said canal takes a general easterly course from the point of said headgate furnishing water for irrigation of lands in Colorado, thence crossing the Colorado-Nebraska line and extending into the State of Nebraska, for the purpose of irrigating lands in said State of Nebraska.

"That the carrying capacity of the complainant's said canal at its headgate is fifty cubic feet of water per second of time.

"That the carrying capacity of said canal at the point where it crosses the Colorado-Nebraska State line is twenty-nine cubic feet of water per second of time, and that said amount of water has (been) since the date of construction of said ditch as hereinafter fixed, been put to beneficial use by the parties

entitled thereto in the irrigation of lands within the State of Nebraska, and that by reason of such continued beneficial use, there has become vested a property right to the continued use thereof.

"That the complainant be and hereby is adjudged and decreed to be entitled to divert from the North Fork of the Republican River that quantity of water at its headgate as will, with reasonable care, deliver at the Colorado-Nebraska State line, to be measured at the measuring weir in said canal at the Colorado-Nebraska State line, twenty-nine cubic feet of water per second of time, for the use and benefit of parties lawfully entitled thereto in the irrigation of land lying under said ditch within the State of Nebraska.

"That the right in point of time to divert said water to be carried in said canal for purposes of irrigation in Nebraska is of date and priority as that fixed by the district court sitting in Phillips County, Colorado, on the hearing of a certain cause, No. 872, entitled 'In the Matter of the Adjudication of Priorities of Right for the use of water for irrigation and other beneficial purposes in Water District No. 65 in Water Division No. 1 of the State of Colorado,' wherein it was adjudged by said district court that said date and priority for the users of water carried in said ditch by owners of lands in the State of Colorado was April 4, 1890, and under priority No. 6, and said date being also the same

date adjudged and decreed to said canal in a proceeding before the State Board of Irrigation, Highways and Drainage of the State of Nebraska held for that purpose.

"And it is further ordered, adjudged and decreed that the respondents John E. Field, as State Engineer, Filmore Cogswell, as Division Engineer of Irrigation Division No. 1 of the State of Colorado, and Dwight L. Bower, as Water Commissioner of District No. 65 in said Irrigation Division, and their successors in office, and all persons acting by, through or under them be and each of them is hereby restrained and enjoined from interfering with the right of the complainant to said water as herein adjudged, and said defendants and their successors in office and all persons claiming by, through, or under them, or either of them, are hereby enjoined from treating the complainant in the distribution of water in said water district and division, otherwise than it would be treated if said canal were wholly within the State of Colorado, and all lands irrigated therefrom were in said last named state, or in any manner depriving the complainant of the continued beneficial use and enjoyment of its said vested priority and property rights as herein found and decreed and as the same were and are recognized, defined, and designated by the decree of said district court sitting in Phillips County in said cause No. 872 and in said judgment and decree of said State Board of

Irrigation, Highways and Drainage of the State of Nebraska.

"It is further adjudged, that any other question that may be included in the issues herein joined under the pleadings is not considered or determined, but is withdrawn and expressly left open for consideration and determination in any controversy that may hereafter arise.

"It is further ordered, that the complainant recover of the defendants their costs in this behalf laid out and expended, to be taxed, and that they have execution therefore."

(6)—Opinion and Decree, Circuit Court of Appeals.

The case was taken by appeal to the United States Circuit Court of Appeals, 8th district.

On June 14, 1915, Adelbert A. Weiland, succeeding state engineer of the State of Colorado, was substituted for respondent John E. Field.

Thereafter and during the September term, 1916, after oral argument on September 4, 1916, the United States Circuit Court of Appeals, 8th district, rendered its opinion and decree which, omitting title, is as follows:

"No. 4512

"Before Sanborn and Carland, Circuit Judges, and Trieber, District Judge.

"Carland, Circuit Judge, delivered the opinion of the Court:

"The Pioneer Irrigation Company, a Nebraska corporation, hereafter called the

plaintiff, commenced this action against John E. Field, State Engineer, Filmore Cogswell, Division Engineer, and Dwight L. Bower, Commissioner of Water District No. 65, as officers of the State of Colorado, having official duties to perform in reference to the distribution of water from the streams of said state for irrigation purposes and against the owners of other irrigating ditches diverting water from the North Fork of the Republican River in Colorado, said defendants being citizens of said state. After a hearing upon pleadings and proofs a decree was entered for the plaintiff and defendants appeal.

"The complaint alleged that the plaintiff was the owner of an irrigating ditch diverting water from the North Fork of the Republican River, a natural stream arising in the State of Colorado and flowing in its natural state in at least some quantity into the State of Nebraska; that said ditch had been constructed with reasonable diligence commencing April 4, 1890, and diverted water from the river aforesaid at a point in Colorado, some miles distant from the line between Colorado and Nebraska and irrigated some lands in Colorado and some in Nebraska; that the plaintiff and its predecessors in title had maintained the ditch for irrigation and domestic purposes from the date of its construction to the commencement of the present action on August 8, 1913, without complaint on the part of any one; that said ditch had a carrying capacity of ninety-two

cubic feet of water per second of time diverted and applied as follows: Fifteen second feet in Colorado and seventy-seven second feet of water for the irrigation of lands in Nebraska; that said ninety-two feet had been carried and put to beneficial use by said ditch for lands in Colorado and Nebraska without hinderance during the time above mentioned; that the value of said ditch was $200,000, the portion thereof in the State of Nebraska being of the value of $150,000; that the defendants who were ditch owners failed to maintain headgates as required by the laws of Colorado on their ditches through which water could be measured; that the defendants, state officers, failed to require said ditch owners to maintain headgates as required by law although often requested so to do by plaintiff, that plaintiff had requested said officials to allow ninety-two cubic feet to be turned out from the Republican River to plaintiff's ditch, but that said officials had refused to allow more than fifteen feet as a priority to plaintiff's ditch and also refused the right of plaintiff to divert water for use in the State of Nebraska, said state officials did allow, however, ditch owners junior to that of the plaintiff to divert and apply water regardless of the rights of plaintiff; that said officials allowed the owners of ditches prior in right to plaintiff to divert more water than they could put to beneficial use, the complaint alleging specifically excessive diversions by ditches having an earlier date of pri-

ority than that owned by plaintiff, and that the water so diverted by them could not be measured on account of the failure to install proper headgates and measuring weirs.

"The plaintiff prayed for an injunction restraining the defendants who were owners of ditches from diverting water until headgates were placed in their ditches and restraining said state officials from interfering with the right of plaintiff to divert seventy-seven feet into its headgate for use in the irrigation of lands in Nebraska and restraining ditch owners prior in right to that of the plaintiff from diverting more water than necessary for the irrigation of the lands under said ditches.

"After the filing of the complaint the defendants, state officials, interposed a motion to dismiss the same on the ground among others that the court had no jurisdiction of the action or of the persons of the defendants, for the reason that the suit was one against the State of Colorado without its consent in violation of the provisions of the eleventh amendment to the Constitution of the United States. The motion was denied and this ruling is assigned as error. In discussing the point raised by the ruling of the court, counsel on both sides have by elaborate arguments, gone into the question as to whether the State of Colorado is the owner of all the water flowing in the streams of Colorado. The defendants claim that the state is such owner and that the state offi-

cials, who are made defendants, are simply the agents of the state, hence the state is the real defendant, and the action cannot be maintained, for the reason above stated.

"We do not think, however, that it is necessary to decide, in determining the question before us, as to whether the State of Colorado is the owner of all the unappropriated water flowing in the streams of that state, as conceding, without deciding that Colorado is the owner of such waters, still we think the present action was not one against the state.

"The plaintiff alleges that it is the owner of a ditch which has diverted a certain number of feet per second of water from the North Fork of the Republican River in Colorado, and has used said water in the irrigation of lands in Colorado and Nebraska for more than twenty years without any complaint or hinderance from anyone; that said waters so diverted have been used in the proportion of fifteen feet in Colorado and seventy-seven feet in Nebraska during the time mentioned. It also alleges that the officers of the state, who are made defendants, refuse to allow the plaintiff to divert more than fifteen feet, and required said fifteen feet to be used in the State of Colorado.

"The suit is not one to compel the state officers cease interfering, in violation of law State of Colorado or to control the performance of their general duties, but is a suit which seeks to compel said officers to cease

violating what is claimed to be the law of Colorado and the rights to which the plaintiff claims it is entitled. In support of the contention of the defendants the recent case of Lankford v. Platte Iron Works, 235 U. S. 461, is cited. That case, however, is very much different than the case at bar. In the case cited it was decided that the Banking Board, created by the laws of Oklahoma, had been given jurisdiction to supervise and control the distribution of the Depositors' Guaranty Fund, and that a court of equity could not take the power of control from the Banking Board, as in the absence of any showing to the contrary the court must assume that the Banking Board would faithfully manage and apply the funds. In this case the plaintiff simply asks that the state officers to act in violation of the laws of the with the rights of the plaintiff. In Weyman-Bruton Company v. Ladd, 231 Fed. 898, this court said as follows:

"'Whatever might have been the rule at an earlier date, it is now beyond question that, if the acts of an officer are beyond the authority vested in him by law, an action against him for trespass, in an action at law, or to enjoin him in equity, is within the jurisdiction of the national courts, if there is the proper diversity of citizenship, and the amount involved exceeds $3,000, both of which appear from the face of the complaint in the instant case. Ex Parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13

L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Western Union Tel. Co. v. Andrews, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. Ed. 430; Harrison v. St. Louis & San Francisco R. Co., 232 U. S. 318, 34 Sup. Ct. 333, 58 L. Ed. 621, L. R. A., 1915 F, 1187.'

"See also Magruder v. Belle Fourche Valley Water Users Ass'n, 219 Fed. 72 (8th Cir.); Wadsworth v. Boysen, 148 Fed. 771 (8th Cir.); Morris v. Bean, 146 Fed. 423; Anderson v. Bassman, 140 Fed. 14.

"It is our opinion that the case cannot be said to be one against the State of Colorado within the meaning of the Constitution. F. D. Johnson, one of the original defendants, moved to dismiss the bill because it appeared from the face thereof that other appropriators of water, namely, the owners of the Carroll and Gilmore ditch, and the Chicago, Burlington and Quincy Railroad Company were not made defendants. In denying the motions of the other defendants to dismiss, the court ordered that the complaint be amended by making C. A. Phillips, W. A. Sharp, F. H. Johnson, owners of the Carroll and Gilmore ditch, and the Chicago, Burlington and Quincy Railroad Company as the owner of the Chicago, Burlington and Quincy pipe line ditch, defendants. At the trial the defendants offered to prove that the owners of the Carroll and Gilmore ditch at the time of the commencement of the action were and ever since had been citizens of the State of Nebraska, the same state as

that of the plaintiff. Counsel for plaintiff admitted that such was the fact. The court ruled that conceding the facts to be as stated it did not oust the court of jurisdiction. We do not think there was error in this ruling as the defendants brought into the case by order of the court, were not indispensable parties, without whom no decree could be rendered. In Minnesota v. Northern Securities Company, 184 U. S. 236, in speaking of the classes of parties to a bill in equity, it was said:

"'They are: (1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.'

"See also Hawes v. First National Bank, 229 Fed. 51, a decision by this court where most of the cases upon the subject are cited.

"It also appears from the record that the owners of the Carroll and Gilmore ditch never appeared or answered, and the decree rendered did not affect their rights, as said ditch was admitted to be junior to that of the plaintiff. We, therefore, conclude there was no error in deciding that the court had jurisdiction. At the trial, the defendants offered to prove that senior ditch owners were using only the amount of water necessary for the irrigation of the lands lying under such ditches without waste. The court denied the offer, for the reason, as the court stated, that it only intended to fix the relative priority of the plaintiff's ditch, and that whether or not other appropriators were diverting more water than they were entitled to, would not be decided, but left open for some future proceeding, and the decree in this case does leave that question undecided. In view of this disposition of the case there was no error in this ruling.

"The decree entered by the court established the ownership of the plaintiff to the Pioneer canal and ditch; that the carrying capacity of the ditch at its headgate was fifty cubic feet of water per second of time; that the carrying capacity of said canal at the point where it crosses the Colorado and Nebraska State line, is twenty cubic feet of water per second of time, and that said

amount of water had, since the day of construction of the ditch, been put to a beneficial use for the parties entitled thereto in the irrigation of lands within the State of Nebraska, and that by reason of such continued beneficial use, a vested right of property to the continued use thereof existed in the plaintiff; that the plaintiff was entitled to divert from the North Fork of the Republican River that quantity of water at its headgate as would with reasonable care deliver at the Colorado-Nebraska State line to be measured at the measuring weir in said canal at the Colorado-Nebraska State line, twenty-nine cubic feet of water per second of time for use and benefit of parties lawfully entitled thereto in the irrigation of lands lying under said gate within the State of Nebraska.

"The court in its decree followed the decision of the District Court of Colorado, sitting in Phillips County, as to the right of the plaintiff in point of time to divert water to be carried in said canal for the purposes of irrigation. The judgment of the District Court was to the effect that the plaintiff's date of priority was April 4, 1890, and in order of time No. 6. The decree then enjoined the state officials and their successors in office from interfering with the right of the plaintiff to said water as therein adjudged, and from treating plaintiff in the distribution of water in said water district and division, otherwise than it would be

treated if said canal were wholly within the State of Colorado, and all lands irrigated therefrom were in the said state. It further decreed that any other question that might be included in the issues joined under the pleadings would not be considered or determined, but would be considered as withdrawn and expressly left open for consideration and determination in any controversy that might thereafter arise.

"The brief of counsel for appellant does not comply in any respect with rule twenty-four of this court. In no place where the error alleged relates to the admission or rejection of evidence is the full substance of the evidence admitted or rejected or any part thereof quoted. It is said in the brief, as to assignments four to nineteen, that they might be considered together, and did not require extended discussion, that if the court was without jurisdiction the rulings of the court were of no importance, but if the court did have jurisdiction, that it was obvious from what had already been said that the court should have decided the whole case rather than to adjudge it in only one of its aspects. That it was manifest from the testimony ruled out, the exhibits rejected, and the offers of proof refused, that all had important and essential bearing upon the question as to how much water plaintiff was entitled to in Nebraska if the court had jurisdiction.

"We cannot review the admission and rejection of evidence on any such discussion

as this. Complaint is made that the court adjudged all the costs against the defendants. This was an action in equity, and in adjudging costs the court was exercising its undoubted discretion with which we will not interfere.

"That the decree rendered by the court below is erroneous in whole or in part, assuming the court had jurisdiction, and we decide that it had, is neither assigned as error or argued in brief by counsel for appellants. The decre appealed from, therefore must be

"Affirmed,

"And it is so ordered.

"Filed November 18, 1916.

"(Decree.)

"United States Circuit Court of Appeals, Eighth Circuit, September Term, 1916.

"No. 4512.

"Adelbert A. Weiland, as State Engineer of of the State of Colorado; Filmore Cogswell, as Division Engineer of Irrigation Division No. 1 of the State of Colorado; Dwight L. Bower, as Water Commissioner of District No. 65 of Irrigation Division No. 1 of the State of Colorado; F. D. Johnson, William Pyle, J. B. Cunningham, S. W. Seward, C. A. Patton, Frank W. Pickett, J. J. Cassin, Pierce Miller, R. M. Reed, William Heindal, W. E. Wolfe, and George Short, Appellants,

vs.

"The Pioneer Irrigation Company.

"Appeal from the District Court of the United States for the District of Colorado.

"Monday, November 20, 1916.

"This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado, and was argued by counsel.

"On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said district court, in this cause, be, and the same is hereby, affirmed with costs; and that the Pioneer Irri-

gation Company have and recover against Adelbert A. Weiland, as State Engineer of the State of Colorado; Filmore Cogswell, as Division Engineer of Irrigation Division No. 1, of the State of Colorado, Dwight L. Bower, as Water Commissioner of District No. 65 of Irrigation Division No. 1, of the State of Colorado; F. D. Johnson, William Pyle, J. B. Cunningham, S. W. Seward, C. A. Patton, Frank W. Pickett, J. J. Cassin, Pierce Miller, R. M. Reed, William Heindal, W. E. Wolfe, and George Short the sum of twenty dollars for its costs herein and have execution therefor.

"November 20, 1916."

(7)—Assignment of Error on Appeal to United States Supreme Court.

Appeal to the United States Supreme Court having been allowed by the Circuit Court of Appeals, February 8, 1917, the following assignments of error to the opinion and decree of the Circuit Court of Appeals were entered (R., 59):

"(Assignment of Errors on Appeal to Supreme Court U. S.)

"The appellants in the above entitled cause, in connection with and preliminary to the filing of their petition for appeal herein, say that the order, decision or decree entered in the above cause in the United States Circuit Court of Appeals for the Eighth Circuit on the 20th day of November, A. D.,

1916, is erroneous and unjust to appellants and that in the record and proceedings therein there is manifest error and that the United States Circuit Court of Appeals for the Eighth Circuit erred in this, to-wit:

"I.

"Because the United States District Court for the District of Colorado was without jurisdiction of this cause and had no jurisdiction of the subject matter of the action, inasmuch as the action was brought by a citizen of the State of Nebraska against the defendants below, appellants herein, John E. Field, as State Engineer of the State of Colorado (for whom has been substituted his successor in office, Adelbert A. Weiland), Fillmore Cogswell, as Division Engineer of Irrigation Division No. 1 of the State of Colorado, and Dwight L. Bower, as Water Commissioner of Water District No. 65 of the State of Colorado, each being a state official of said state, seeking to compel and require said state officials, as the agents and representatives of the State of Colorado, to distribute the waters of a natural stream of the State of Colorado contrary to the laws of said state, the said State of Colorado having exclusive control of said stream within its territorial limits, and thereby and by means of such suit to require the State of Colorado to do or refrain from doing certain acts and things in the exercise of its power and authority as a sovereign state and concerning which

the Supreme Court of the United States has exclusive jurisdiction.

"II.

"Because the United States Circuit Court of Appeals for the Eighth Circuit erroneously found and held that the action was not directly or in effect a suit against the State of Colorado.

"III.

"Because the United States Circuit Court of Appeals for the Eighth Circuit misconstrued the record in ruling and determining that this action was one in which it was sought to compel the said officers of the State of Colorado to cease violating what is claimed to be the law of the State of Colorado and the rights to which the appellee claims it is entitled.

"IV.

"Because the United States Circuit Court of Appeals for the Eighth Circuit erred in holding and deciding that this suit is not one seeking to compel the state officers to act in violation of the laws of the State of Colorado.

"V.

"Because the United States Circuit Court of Appeals for the Eighth Circuit misconstrued or misunderstood the record in holding and deciding that this was a suit which seeks to compel said state officers to

cease from violating the law of the State of Colorado, inasmuch as the record of the decree of the United States District Court for the District of Colorado clearly shows that all questions, other than that the plaintiff below, appellee herein, is adjudged and decreed to be entitled to divert from the North Fork of the Republican River that quantity of water at its headgate as will, with reasonable care, deliver at the Colorado-Nebraska state line, to be measured at the measuring weir in said canal at said state line, twenty-nine (29) cubic feet of water per second of time for the use and benefit of parties lawfully entitled thereto in the irrigation of lands lying under said ditch within the State of Nebraska, under a priority of right of the date of April 4, 1890, and that said state officers and their successors in office, and all parties acting by, through or under them, be restrained and enjoined from interfering with the right of the complainant to said water as therein adjudged, or from treating the complainant, in the distribution of water in said water district and division, otherwise than it would be treated if said canal and all lands irrigated therefrom were wholly within the State of Colorado, or from in any manner depriving the complainant of the continued beneficial use and enjoyment of its said vested priority and property rights as found and decreed, and inasmuch as it was further adjudged that any other question that may be included in the issues therein joined under

the pleadings, is not considered or deter-, mined, but is withdrawn and expressly left open for consideration and determination in any controversy that may hereafter arise.

"VI.

"Because the United States Circuit Court of Appeals for the Eighth Circuit misconstrued the record in this cause in this: That although it is alleged in the bill of complaint that the defendants are violating the laws of the State of Colorado, in that no headgates and measuring weirs are maintained in the ditches diverting water within the State of Colorado, as required by the law of Colorado, and in that the Colorado ditches were using water for irrigation in excess of their needs, and in that the state officials named as parties defendant, having control of the distribution of water from the stream in question, were permitting the diversion of water by the Colorado ditches contrary to the law of the State of Colorado, that, nevertheless, each and all of these questions and any other question affecting or claimed to affect or claimed to be in violation of the laws of the State of Colorado, was expressly dismissed from the case by the trial court.

"VII.

"Because the United States Circuit Court of Appeals for the Eighth Circuit erred in finding and determining that this was a suit to compel the state officers to cease from

violating the laws of the State of Colorado, whereas, in truth and in fact, all questions of the violation of the law of the State of Colorado were dismissed from consideration and expressly withdrawn by the United States District Court for the District of Colorado, and left open for future determination.

"VIII.

"Because the United States Circuit Court of Appeals for the Eighth Circuit erred in ruling and determining that the United States District Court for the District of Colorado had jurisdiction of the subject matter of this action.

"IX.

"Because the United States Circuit Court of Appeals for the Eighth Circuit erred in failing to consider appellants' assignment of error numbered IV, wherein appellants assigned as error that the United States District Court for the District of Colorado erred in refusing to admit in evidence the testimony offered by defendants to show their ownership of riparian lands and the economical application of the waters thereto by riparian owners without waste and only in such quantities as riparian owners of right might use for the irrigation of riparian lands by reason of their riparian rights, regardless of the dates of appropriation; such proof being offered by defendants for the purpose of establishing the

beneficial application of water by consumers thereof upon forty acre tracts through which the natural stream ran, and which, under the laws of the State of Nebraska, would entitle them, regardless of the date of user, to maintain their use as against the matters and things charged in the bill of complaint against them, and which, under the laws of the United States, would entitle them to such use, and thereby the trial court denied to the defendant below any protection of their rights either under the laws of the State of Colorado or under the laws of the State of Nebraska.

"X.

"Because the United States Circuit Court of Appeals for the Eighth Circuit erred in failing to consider appellants' assignment of error numbered V, wherein it is assigned as error that the trial court erred in sustaining the objection of the complainant below, appellee herein, to respondents' Exhibit 1, and rejecting the offer of said exhibit as evidence in the cause, the same being offered to show that the lands of respondents were patented by the United States prior to the year 1889 to respondents or their predecessors in interest, and that the same were largely forty-acre tracts, through which respondents then and there offered to show the natural stream from which water was taken for irrigation ran, and further offered to show that the waters from said

stream were used by them as riparian owners, economically and without waste, and was returned to the natural stream without waste, all of which offer in connection with the said Exhibit 1 was then and there rejected by the court, and to which respondents then and there excepted.

"XI.

"Because the United States Circuit Court of Appeals for the Eighth Circuit erred in declining to consider appellants' assignment of error numbered VI, wherein it is alleged that the trial court erred in rejecting the evidence offered by respondents to show the amount of land irrigated under the ditches of respondents, and that the water was used economically and without waste.

"XII.

"Because the United States Circuit Court of Appeals for the Eighth Circuit erred in declining to consider the assignment of error numbered VII, wherein it was alleged that the trial court erred in refusing to admit in evidence the proof of respondents of the amount of return water to the natural stream after use by defendants, in support of the allegation of defendants' answer that the water was used economically and without waste, and for the purpose of showing that under the conditions otherwise shown to exist from the evidence in the cause, an equitable proportion of the natural stream was

permitted to flow down the same for use in the State of Nebraska.

"XIII.

"Because the United States Circuit Court of Appeals for the Eighth Circuit declined to consider appellants' assignment of error numbered VIII, wherein it was alleged that the trial court erred in holding that evidence to establish an equitable use of water by the users of the State of Colorado and the users of the State of Nebraska, or between the two states, was immaterial and irrelevant, and excluded the evidence offered in support of the same, the same being contained in the offer in writing entitled 'Defendants' Offer to Prove,' consisting of eleven paragraphs set forth in the record.

"XIV.

"Because the United States Circuit Court of Appeals for the Eighth Circuit declined to consider appellants' assignment of error numbered IX, wherein it was alleged that the trial court erred in sustaining the objection to the evidence offered by respondents in paragraph first of respondents' offer to prove in writing, as follows:

"First. That there is a very heavy return flow to the North Fork of the Republican River from seepage and run-off from irrigation of Colorado lands.

"XV.

"Because the United States Circuit Court of Appeals for the Eighth Circuit declined to consider appellants' assignment of error numbered X, wherein it was alleged that the trial court erred in sustaining the objection to the evidence offered by respondents in paragraph second of respondents' offer to prove in writing, as follows:

"Second. That each of the Colorado ditches has adequate headgates and measuring devices.

"XVI.

"Because the United States Circuit Court of Appeals for the Eighth Circuit declined to consider appellants' assignment of error numbered XI, wherein it was alleged that the trial court erred in sustaining the objection to the evidence offered by respondents in paragraph third of respondents' offer to prove in writing, as follows:

"Third. That the Colorado ditches divert water to the amount of their respective appropriations where the capacity of the stream permits it, and that the same is used for necessary irrigation of the lands lying under the ditches without waste, and this offer is made as to all ditches having priorities superior and prior to the Haigler or Pioneer canal as well as to those subsequent in time of appropriation.

"XVII.

"Because the United States Circuit Court of Appeals for the Eighth Circuit declined to consider appellants' assignment of error numbered XII, wherein it was alleged that the trial court erred in sustaining the objection to the evidence offered as paragraph fourth of respondents' offer to prove as follows, together with Exhibit 7 offered in connection therewith:

"Fourth. That the normal stream or surface flow of the North Fork of the Republican River at the headgate of the Pioneer dam, without any diversion above that point whatsoever, is only 45 cubic feet per second and is practically constant in the absence of heavy storms and that the same is a less quantity than that flowing in the stream at and also above the town of Wray, Colorado, under like conditions, but, however, the water is not lost, but contributes to the underflow which, on account of the topography of the country adjacent to the stream easterly to the Colorado-Nebraska state line, irrigates large areas of land in the State of Nebraska, with the result that the State of Nebraska enjoys a greater use of the waters of the stream arising in Colorado than does the State of Colorado and appropriators thereunder.

"XVIII.

"Because the United States Circuit Court of Appeals for the Eighth Circuit declined to consider appellants' assignment of

error numbered XIII, wherein it was alleged that the trial court erred in sustaining the objection to the evidence offered by respondents as paragraph fifth of respondents' offer to prove in writing, as follows:

"Fifth. That by reason of the diversion of water by the Colorado ditches in the amounts heretofore diverted and enjoyed by them, the run-off of the stream during the periods of flow greater than normal is conserved and stored in the soil and by reason of seepage and return flow therefrom augments and increases the normal flow of the stream at the Pioneer headgate.

"XIX.

"Because the United States Circuit Court of Appeals for the Eighth Circuit declined to consider appellants' assignment of error numbered XIV, wherein it was alleged that the trial court erred in sustaining the objection to the evidence offered by respondents as paragraph sixth of respondents' offer to prove in writing, as follows:

"Sixth. Irrigation on the upper reaches of the stream is the highest and most economic use of water where irrigation is required and results in the conservation of the supply and the irrigation of a greater amount of land in the states of Colorado and Nebraska jointly.

"XX.

"Because the United States Circuit Court of Appeals for the Eighth Circuit de-

clined to consider appellants' assignment of error numbered XV, wherein it was alleged that the trial court erred in sustaining the objection to the evidence offered by respondents as paragraph seventh of respondents' offer to prove in writing, as follows:

"Seventh. That Colorado is the apex of the continent and furnishes water to lower states in every direction; that it contributes to the State of Nebraska through this and other streams more than 300,000 acre feet per annum and receives no water in return, and that in Colorado successful agriculture is possible only through the aid of irrigation, while in Nebraska irrigation is not necessary throughout the larger portion of the state.

"XXI.

"Because the United States Circuit Court of Appeals for the Eighth Circuit declined to consider appellants' assignment of error numbered XVI, wherein it was alleged that the trial court erred in sustaining the objection to the evidence offered by respondents as paragraph eighth of respondents' offer to prove in writing, as follows:

"Eighth. That there is one ditch heading at or near the town of Wray, used for power purposes, with an appropriation of 50 cubic feet per second, owned by the Wray Mills Company, a Nebraska corporation, not a party to this action, and that said mill race is prior in time of appropriation to some of the ditches diverting water from the stream

or its tributaries above the point of its headgate.

"XXII.

"Because the United States Circuit Court of Appeals for the Eighth Circuit declined to consider appellants' assignment of error numbered XVII, wherein it was alleged that the trial court erred in sustaining the objection to the evidence offered by respondents as paragraph ninth of respondents' offer to prove in writing as follows:

"Ninth. That neither the State of Nebraska nor the Pioneer ditch has made any attempt to utilize or to store the water flowing in the stream during the non-irrigating season, although reservoirs to conserve such supply are feasible for the use of lands under the Pioneer canal as well as other lands within the State of Nebraska, but that such reservoirs are not possible within the State of Colorado because of the diversion of water by the mill race at all seasons of the year.

"XXIII.

"Because the United States Circuit Court of Appeals for the Eighth Circuit declined to consider appellants' assignment of error numbered XVIII, wherein it was alleged that the trial court erred in sustaining the objections to the evidence offered by respondents as paragraph tenth of respondents' offer to prove in writing, as follows:

"Tenth. That the total amount of land actually irrigated in Colorado from the North

Fork of the Republican River is 3,341 acres, of which 810 are under the Pioneer canal.

"XXIV.

"Because the United States Circuit Court of Appeals for the Eighth Circuit declined to consider appellants' assignment of error numbered XIX, wherein it was alleged that the trial court erred in sustaining the objections to the evidence offered by respondents in paragraph eleventh of respondents' offer to prove in writing, as follows:

"Eleventh. That because of the difference in the character of the soil in Colorado from that in Nebraska under the Pioneer canal, more water is necessary both for the diversion and application in Colorado than under the Pioneer, but the return is larger and more rapid and that this return is largely due to the stream and is available for use at the Pioneer dam and that the actual consumptive use is practically the same for both areas.

"XXV.

"Because the United States Circuit Court of Appeals for the Eighth Circuit erred in declining to consider appellants' assignments of error, numbered IV to XIV inclusive, inasmuch as these assignments of error related to the offer of certain evidence which was denied by the trial court, and which, if introduced, would prove, or tend to prove, that the application of water for irrigation upon the lands in Colorado by means of the

ditches owned by the defendants below, appellants herein, was economical and without waste and was in accordance with the laws, rules and decisions of the State of Colorado; that there was an abundant return of seepage water almost immediately to the stream from the lands upon which the water was applied, which was available for the ditch of the appellee or for other use within the State of Nebraska; that by reason of a peculiar topographical formation, there is a very heavy loss from the stream from a point below the major portion of the irrigated lands from said stream within the State of Colorado to the headgate of complainant's ditch, and that the use of water above that point in Colorado did not and does not materially affect the flow of the stream at the headgate of complainant's ditch; that irrigation on the upper reaches of the stream is the highest and most economical use of water where irrigation is required, and results in the conservation of the supply and the irrigation of a greater amount of land; that Colorado, which is the apex of the continent, furnishes water to lower states in every direction and contributes to the State of Nebraska, through the stream in controversy, and other streams, more than 300,000 acre feet per annum, but receives no water in return, and that whereas in Colorado successful agriculture is possible only through the aid of irrigation, nevertheless in Nebraska irrigation is not necessary throughout the larger por-

tion of the state; that the complainant's ditch had ample opportunity for storing and conserving water flowing in the stream in question when the same was not immediately needed for irrigation, but that the Colorado ditches were precluded from making such storage, for the reason that a certain ditch, used to supply power to a certain mill below the larger portion of the irrigated lands from the stream in question in Colorado, required the water at all seasons of the year, but that such water was available for storage in the non-irrigating season by the complainant's ditch, this evidence being offered by the defendants below in writing, coupled with a stipulation agreed to by the complainant below in open court, as appears from the record of the trial court, 'that without specific questions being asked and objection made thereto, the respondents may make a written offer to prove, by the witness then on the stand, and other witnesses, the matters and things contained in said offer in writing, and that no contention would be made in the Appellate Court that specific questions were not asked.' The witness then on the stand being an engineer representing defendants in said cause, said evidence being offered to prove that the irrigation of lands in Colorado by the Colorado ditches, made defendants in the court below, would not materially affect the flow of the stream at the headgate of complainant's ditch, and, further, that in any event the State of Colorado

and its citizens were using only an equitable amount of water from said stream.

"XXVI.

"Because the United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the decree of the United States District Court for the District of Colorado, wherein it was, in effect the judgment and decree of the court, that a ditch diverting water for the irrigation of lands within the territorial limits of the State of Nebraska is entitled to take water for irrigation upon the basis of the date of its priority as against Colorado ditches diverting water from the same stream for irrigation of lands lying within the State of Colorado—the State of Colorado having at all times expressly declined to ignore its boundary lines in this regard, and having at all times expressly declined, by legislation and the decisions of its courts, to allow the same rights to the diversion of water according to the doctrine of priority of appropriation to be acquired from outside the state than can be acquired from within.

"XXVII.

"Because the United States Circuit Court of Appeals for the Eighth Circuit erred in refusing to consider the whole case presented by the record, inasmuch as the evidence offered and denied was pertinent and necessary to be considered in view of the contentions of appellants, and particularly that

this suit is, in effect, a suit against the State of Colorado as a sovereign.

"XXVIII.

"Because the United States Circuit Court of Appeals for the Eighth Circuit erred in affirming the decree of the United States District Court for the District of Colorado.

"Wherefore, appellants pray that the decision of the United States Circuit Court of Appeals for the Eighth Circuit be reversed, and for such other and further relief as to the court may seem meet and just.

"FRED FARRAR,
"CHARLES L. ALLEN,
"Solicitors for Appellants.

"(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 10, 1917."

(8)—Motion to Dismiss Appeal.

After the case was brought to this court, appellee filed a motion to dismiss the appeal or to affirm the decision of the Circuit Court of Appeals, for the alleged reasons that, although the jurisdiction of the District Court was invoked upon the dual grounds of diversity of citizenship and constitutional questions, the case was disposed of by the trial court and the Circuit Court of Appeals upon other and different grounds and for want of jurisdiction in this court.

Thereafter briefs were filed upon said motion to dismiss or affirm.

The full case is now presented upon final hearing.

ARGUMENT.

I.

The District Court had no jurisdiction of the action, for the reason that the suit was one against the State of Colorado without its consent, in violation of the provisions of the Eleventh Amendment to the Constitution of the United States, and the State of Colorado was an indispensable party.

Assignments of error I to VII inclusive, XV, XVI and XXVII may be considered together, as the errors there assigned to the decision of the Circuit Court of Appeals, go to the question of the jurisdiction of the District Court to entertain the suit in the first instance or thereafter to enter the decree from which appeal was taken, for the reason that the suit was, in effect, one against the State of Colorado without its consent, in violation of the provisions of the Eleventh Amendment to the Constitution of the United States, and the state was an indispensable party to the action.

If, in substance, the suit is one against the State of Colorado, or if the State of Colorado is an indispensable party, the District Court had no jurisdiction. It is contended that such was the nature of the action.

If the suit was, in effect, one determining matters between Nebraska and Colorado, the District Court was without jurisdiction, and the substance of the controversy was cognizable only in a suit between the two states in this court. It is maintained that the effect of the suit instituted and the decrees entered was to determine matters between the State

of Nebraska and the State of Colorado. The enforcement of the relief sought by the suit and granted by the decree of the District Court is as effectual in depriving the State of Colorado of a portion of the waters of its streams, without its consent, as though the decree had been entered in this court in a suit between the two states.

Whatever line of reasoning may be followed, the fact remains beyond question that the greater part of the waters of the stream were taken from Colorado and given to Nebraska.

The Eleventh Amendment to the Federal Constitution provides:

> "The judicial power of the United States shall not be considered to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state or by subjects of any foreign state."

If the relief sought by the suit in the District Court or granted in the decree of that court is in effect against the State of Colorado, either by reason of the property or sovereign rights affected or by control of the executive officials of the state whereby they are compelled to violate the Constitution and laws of Colorado, it clearly comes within the inhibition of the Eleventh Amendment.

The action was in legal substance one against the State of Colorado, and that state was an indispensable party to a determination of the matters involved. The suit involved the title of the State of Colorado to the waters of the North Fork of the Re-

publican River. It involved a determination of the interest of the state in the waters of the stream as a whole, preliminary to the establishment of private claims, and involved the status of so much of those waters as complainant demanded it be permitted to withdraw and carry from without the state for application upon foreign soil. It involved the direction of state action in Colorado and the control of the action of the official defendants, who were representing the State of Colorado under its Constitution and statutes, even to the extent of compelling them to violate the Constitution, statutes and the decisions of the courts of the state and of over-riding valid state laws by judicial process.

The Constitution and laws of Colorado were not alleged or determined to be in violation of any of the provisions of the Constitution of the United States.

The suit involved a limitation of the sovereign capacity of the State of Colorado and was not a mere private contest, and the final decree which was entered affected the interests and property of Colorado as effectually as though the state had itself been joined.

As we are advised, it would have been the duty of the District Court to consider the question of jurisdiction in the first instance, of its own motion, if the question had not been raised by appropriate pleadings. As stated by this court, speaking through Mr. Justice Brewer, in *Minnesota vs. Hitchcock*, 185 U. S. 373, 382:

> "A preliminary question is one of jurisdiction. * * * It is the duty of every court of its own motion to inquire into the

matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject matter."

But, in the case at bar, the jurisdiction of the District Court over the persons and the subject matter of the suit was raised at the outset by motions to dismiss (R., 7). These motions were overruled and the respondents raised the question of jurisdiction by answer (R., 11-14) and at the trial. But the district court assumed jurisdiction and proceeded to decree and the Circuit Court of Appeals affirmed this decree. By the decree the property of the State of Colorado was affected, its territory was expropriated and impressed with a foreign servitude against its will and its executive officials were compelled to violate the Constitution and laws of the state, although no question of the validity of the Colorado Constitution and laws was raised or determined.

(1)—The Suit Involves the Title of the State of Colorado to the Water of the North Fork of the Republican River Flowing in Colorado.

The suit brought, and the decree entered by the District Court, involves the title of the State of Colorado to the waters of the North Fork of the Republican River, which rise from springs within and flow through the territory of the state.

(All Rights Vested After Admission of State).

At the outset it should be observed that both Colorado and Nebraska were admitted to the Union (by Presidential proclamation) long prior to the time when complainant's predecessor, a Colorado corporation, is said to have initiated claims for the water here involved and that no rights which vested during the territorial days of either state are here involved. Colorado was admitted into the Union in 1876 and Nebraska in 1867, and the alleged rights of complainant were initiated in 1890 (R., 4).

(No Government Lands Involved).

All lands in Colorado, riparian to the North Fork of the Republican River, passed by patent from the United States prior to the initiation of complainant's canal (1890) and prior to 1889 (R., 18). The stream is fed, throughout the upper portion of its course in Colorado, by springs arising within the bed of the stream or in the adjacent riparian lands which so passed into private hands prior to 1889 (R., 6). Any theories of government control or title to the waters of this stream, by reason of the riparian location of adjacent government lands, do not apply.

(All Rights Limited by Colorado Laws).

It should further be observed that the complainant, The Pioneer Irrigation Company, while organized as a corporation under the laws of Nebraska on March 1, 1912, purchased the canal here involved on March 30, 1912, a little more than a year prior to the date of the filing of this suit on August 8, 1913. The canal was originally constructed in the early nineties by The Haigler Land and Canal Company, a Colorado

corporation, and was owned by that company until the date of the sale thereof to the complainant corporation. The rights of complainant are necessarily limited, both by physical conditions and citizenship of the real appropriator, to those which its predecessor, the Colorado corporation, may have obtained under the Constitution, laws and decisions of the courts of the State of Colorado and not by reason of any law of the United States or of the State of Nebraska.

The waters are diverted and taken from the stream and carried for several miles wholly within the State of Colorado and are necessarily diverted and carried under the control of and subject to the limitations fixed by its Constitution and laws. All rights acquired by complainant's predecessor were limited by this physical situation and by reason of the fact that the corporation, so diverting the water, was an artificial person and citizen of the State of Colorado and was limited in its powers and rights of appropriation by the Constitution, laws and decisions of the courts of that state, existing at the time of the appropriation or thereafter enacted (*White vs. Highline Canal Co.*, 22 Colo., 191, 197; *O'Neil vs. Northern Colo. Irr. Co.*, 242 U. S. 20; *Northern Pac. Ry. Co. vs. Duluth*, 208 U. S. 583, 596. Whatever rights the Colorado corporation acquired were only such as the Constitution and laws of Colorado permitted her citizens to acquire and when it was sought, by complainant, to change the situation by creating a Nebraska corporation to take conveyance of the property of the Colorado corporation, the former could take and receive no more right to the water in controversy than the Colorado corporation possessed at the

time of the conveyance. The Nebraska corporation, by mere reason of its identity as such, had no better right to the water of the Colorado stream than did its predecessor and its rights were subject to all the limitations which applied to the property while in the hands of the Colorado corporation.

In the face of the foregoing indisputable facts, the bill of complaint, filed in the district court, named as defendants the executive officers of the State of Colorado, who are charged with the duty of exercising general supervision and control of the distribution of the waters of the natural streams within the state, and sued these official defendants, not as individuals, but as such officials. In the bill it is alleged that the suit

> "is brought to obtain redress for the deprivation by defendants, under color of the laws and the statutes of the State of Colorado, of the right and privileges of the complainant, secured to it by the Constitution and laws of the United States providing for the equal rights of citizens of the United States and of persons within the jurisdiction of the United States, to carry on commerce between the State of Colorado and the State of Nebraska, and particularly the right of complaint to divert water, and to transport, carry and sell the same to citizens of the State of Colorado and the State of Nebraska for agricultural and domestic purposes" (R., 5).

In support of these allegations the complainant alleged that its canal diverted water from the stream within the State of Colorado and that both it and its predecessor had submitted the claims for this canal to the state court of Colorado having jurisdiction of the adjudication and settlement of all questions concerning the right of the canal to divert water and apply the same for the irrigation of lands and other purposes. It then claimed further title under an alleged decree by the State Board of Irrigation, Highways and Drainage of the State of Nebraska, entered in proceedings subsequent to the decree of the Colorado court. It appears from these decrees that the Colorado court, in comformity with the Constitution and laws of that state, limited the rights of complainant's canal, so theretofore constructed by the Colorado citizen and diverting water within the State of Colorado, to the irrigation of lands within that state and that the Nebraska decre set up by the complainant did not purport to control the diversion of water from the North Fork of the Republican River in Nebraska, but, on the contrary, assumed extra-territorial effect and sought to control the diversion of waters from the stream in Colorado and the carriage thereof out of that state, without its consent, for application upon lands wholly within the State of Nebraska. As we shall hereinafter more at length observe, the so-called Nebraska decree was void upon its face, could in no wise confer upon the complainant any greater right than it had obtained under the Constitution and laws of Colorado through the conveyance to it by the Colorado corporation and could have no extra-territorial force or effect.

Story on Conflict of Laws, Sec. 32, p. 39;

Cooley Const. Limitations (7th Ed.), p. 176.

This so-called Nebraska decree, so assuming extra-territorial effect and attempting to control the disposition of the territory and natural resources of Colorado, is asserted by complainant and was recognized by the District Court as the basis of a right in complainant to invoke the full faith and credit provision of the Constitution of the United States and was, by the decree of the District Court, impressed upon Colorado territory, and the executive officials of the State of Colorado were enjoined to enforce the void Nebraska decree upon the Colorado stream, and to extract and withdraw a large part of the water therefrom for carriage through that state and into Nebraska, without consent of the State of Colorado and contrary to and in direct violation of its Constitution, laws and the decisions of its courts.

The decree of the United States District Court likewise put into effect the alleged right of the Nebraska corporation to carry and transport waters of the Colorado stream into Nebraska for sale to citizens of that state, under the theory of interstate commerce, and enjoined the executive officials of the state from interfering with the complainant in the exercise of the privilege so decreed and confirmed, in contravention of the Constitution, laws and decisions of the courts of Colorado.

Each of these topics will be hereinafter considered more at length.

It would appear self-evident that the suit and the decree entered therein directly affect the natural resources and territory of the State of Colorado.

The provisions of the Constitution and statutes of the State of Colorado regarding the waters of the streams of its state and use thereof by its citizens and the limitations thereupon placed are set forth at length in Parts I to IV inclusive of the Appendix hereto attached. Article XVI, Section 5, of the Colorado Constitution declares:

> "The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."

It was the evident meaning of this provision that the water of every natural stream not appropriated in the State of Colorado prior to the adoption of the Constitution (1876) belongs to the state. By omitting the words "not heretofore appropriated" the language of the provisions would be "the water of every natural stream within the State of Colorado, is hereby declared to be the property of the public and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." It was the clear intention of the framers of the Constitution to declare that the waters of every natural stream of Colorado are the property of the state and are dedicated, not to the people of other states, but "to the use of the people of the state" of Colorado and that the use thereof should be made by

the people of the state by appropriation as in the Constitution provided. It was the clear intention to exercise exclusive rights over these waters without regard to any appropriations that may have been made in other states and to forever foreclose in advance any claims for extra-territorial servitudes upon the natural resource (the waters of every stream) of the State of Colorado.

As already observed the appropriation of water by the Colorado citizen, the Colorado corporation, was made for the irrigation of lands in Colorado in 1890, fourteen years after the adoption of the Colorado Constitution, and the section above quoted should be considered as though "not heretofore appropriated" had been omitted therefrom.

The Colorado corporation, a creature of that state, initiated this appropriation from the Colorado stream, subject to all of the limitations of the Constitution and statutes of the state and its rights to divert, carry, use and apply the waters of the Colorado stream could be no greater than those conferred by the Constitution and laws of the state.

The declaration of the Colorado Constitution that the water of every natural stream is "the property of the public" is but another manner of stating that such waters are "the property of the state." In various of the arid states like provisions obtain and the waters within some of the states are declared by the constitution to be "the property of the public" and in others to be "the property of the state."

In *Kinney on Irrigation* (2nd Ed.), Sec. 372, p. 633, it is said:

> "Respecting the declaration that the waters are 'the property of the state' or 'the property of the public,' the courts hold that these two terms are synonymous."

In Wyoming the Constitution employs the language "property of the state," while certain of its statutes use the language "the property of the public." In *Farm Investment Co. vs. Carpenter,* 9 Wyo. 110, 138, it was said:

> "There is to be observed no appreciable distinction, under the doctrine of prior appropriation, between the declaration that the water is the property of the public, and that it is the property of the state.
>
> "It is said in McCready v. Virginia, 94 U. S., 391, in discussing the subject of tide waters: 'In like manner the states own the tide waters themselves. * * * For this purpose, the state represents its people, and the ownership is that of the people in their united sovereignty' (citing cases). 'The sovereign is trustee for the public.' 3 Kent's Com., 427.
>
> "The ownership of the state is for the benefit of the public or the people. By either phrase, 'property of the public' or 'property of the state,' the state, as representative of the public or the people, is vested with jurisdiction and control in its sovereign capacity."

See *Fruend on Police Power,* Sec. 417.

In the Wyoming case just cited, it was insisted that the declaration contained in the Constitution was of no force, and that the state, no more than an individual, could acquire property by mere assertion of ownership. The court, however, held that there was no doubt of the power of the people in their Constitution to declare the waters of all natural streams and other bodies of water to be the property of the public or the state, and that if any consent of the United States was needed, this consent appeared not only in the early acts of Congress but as well in the act admitting the state into the Union on an equality with the original thirteen states "in all respects whatsoever." (See *Hawkins v. Bleak*, 243 U. S., 210, 216; *United States v. Cress*, 243 U. S. 316, 319; *Kansas v. Colorado*, 206 U. S., 46, 92-93.)

The provisions of the Constitution of Colorado have been repeatedly construed by the state courts. The construction of the state Constitution by the highest courts of the state, if not conclusive, should be persuasive.

In *Wheeler v. Irrigation Co.*, 10 Colo., 582, 587, Justice Helm said:

> "Our constitution dedicates all unappropriated water in the natural streams of the state 'to the use of the people,' the ownership thereof being vested in 'the public.' * * * We shall presently see that after appropriation the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while

the paramount right to its use, unless forfeited, continues in the appropriator."

On page 589 he further said:

> "The constitutional convention was legislating with reference to the necessities and practical wants of the people. And this body, in its wisdom, ordained that the ownership of the water should remain in the public, with a perpetual right to its use, free of charge, in the people."

In *Fort Morgan Land & Canal Co. vs. South Platte Ditch Co.*, 18 Colo., 1, 2, Chief Justice Hayt thus construed the Constitution:

> "Under our constitution, the water of every natural stream in this state is deemed to be the property of the public. Private ownership of water in the natural streams is not recognized. The right to divert water therefrom and apply the same to beneficial uses is, however, expressly guaranteed."

In *Stockman v. Leddy*, 55 Colo., 24, 27-30, Chief Justice Campbell construed the provisions of the Colorado Constitution in a case involving the right of the legislature to make an appropriation for protecting and defending the rights of the state and its citizens to the waters of the streams of the state. The interpretation of the constitutional provisions and the extent of the claims of the state to the waters of the streams are thus defined:

"From the very beginning of settlement in Colorado territory, and in other arid regions of the West, irrigation has been recognized by federal and state legislation, by the decisions of the federal and state courts, and by the people directly interested, as the declared public policy. These decisions need not be cited. They are abundant. In Section 5 of Article 16 of our state constitution as originally adopted, this public policy is thus tersely expressed: 'The water of every natural stream, not heretofore appppropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.' Other sections of the same article make such provision. This language is both emphatic and clear. It is the voice of the people who ratified the constitution, and declares for all time the public policy of this state, which theretofore had been recognized by all the departments of the dual governments. The statutes which were enacted by the earlier sessions of our general assembly to carry out the provisions of this section provide an elaborate and systematic scheme for the distribution of the waters of the state to those entitled to their use.

"The state has never relinquished its right of ownership and claim to the waters of our natural streams, though it has granted to its citizens, upon prescribed conditions,

the right to the use of such waters for beneficial purposes, and within its own boundaries. The property right, however, in the natural streams, and the waters flowing therein, has never been renounced or relinquished by the state, and it has at all times asserted not only its right of ownership, but the unrestrained right, within its own boundaries, to distribute its waters to those who have, under its authority, acquired, by perfected appropriations, the right to their use.

"This constitution of ours was ratified and adopted by the legal voters of the state in accordance with the conditions prescribed by the enabling act of congress, and the president of the United States in his proclamation admitting Colorado into the Union found the fact to be that the fundamental conditions imposed by congress on the state of Colorado to entitle it to such admission had been complied with. Congress, in passing the enabling act, and the president, in issuing his proclamation, were aware of the existing physical conditions and of the topography and geography of the state. The federal government, by its lawmaking and executive bodies, knew that the natural streams of this state are, in fact, non-navigable within its territorial limits, and practically all of them have their sources within its own boundaries, and that no stream of any importance whose source is without those

boundaries, flows into or through this state. The entire volume of these streams is, therefore, made up of rains and snows that fall upon the surface of lands included within the exterior lines of this state, and of springs which issue from the earth within the same area. Such being the peculiar conditions, the state was justified in asserting its ownership of all the natural streams within its boundaries. When Colorado was admitted into the Union with such a constitution, the federal government, through its lawmaking and executive departments, thereby recognized and confirmed such right of ownership as belonging to the state in its sovereign capacity. We, therefore, find it to be not only that our state constitution and pertinent statutes, but the decisions of the courts and duly announced public policy, all are in accord on the proposition to which the federal government has, as we have just shown, given its consent that the waters of the natural streams of this state belong to the people, to the state, in its sovereign capacity, and that its right to their distribution and control within its borders is free from any interference by any other sovereignty.

"There is nothing in *Lamson v. Vailes*, 27 Colo., 201, 61 Pac. 231, at all inconsistent with this conclusion. In that case this court declined to pass on the question which is involved in the pending action, because it was

not necessary to the decision of that controversy. This court, by then withholding expression of opinion, did not intend to intimate, and did not intimate, that this state did not have full control over its natural streams and the distribution of their waters. The right of congress to regulate and control navigable interstate streams, and the jurisdiction of the Supreme Court of the United States to determine, in a controversy between two or more sovereign states over the waters of an interstate stream, whether they are reasonably exercising their inherent powers of sovereignty, are not overlooked or questioned by us; but these considerations do not, for the reasons above stated, affect or bear upon the right of ownership and control by Colorado of its own natural streams, and its power and authority to regulate the distribution of their waters, within its own territory, for beneficial purposes. We find nothing in *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690; *Kansas v. Colorado*, 206 U. S. 46; *Rickey L. & C. Co. v. Miller & Lux*, 218 U. S. 258; *Bean v. Morris*, 221 U. S. 485, or in any other case that has been brought to our attention, which militates against our conclusion, when these cases are considered, as they should be, in connection with the facts on which they were determined. We, therefore, conclude that the general assembly, in order to protect the rights of the state in our natural streams

and their waters, and the interests which its citizens have acquired thereunder, may make a valid appropriation of money for the purpose of protecting and defending them."

The frequent assertion of title in and claim to the waters of the Colorado streams by neighboring states and the citizens thereof, finally caused the legislature to interpret the constitution by legislative enactment during the year 1917. By the act of March 30, 1917 (*S. L. Colo., 1917,* Ch. 151, p. 539). the Colorado legislature enacted a law modeled after the New Jersey act, construed in *Hudson Co. Water Co. v. McCarter,* 209 U. S. 349, but drafted to conform to Colorado legislative procedure. (See copies N. J. and Colo. acts, Appendix, Part II.) By this act the state of Colorado has reasserted the provisions of its constitution and sought to protect the waters of its streams, which constitute its greatest natural resource, and are imperative for the health and welfare of its inhabitants and the reclamation of its arid lands, by forbidding every person to divert, carry or transport the waters of the state into other states for use therein. The executive officials of Colorado (the respondent water officials in this suit) are directed to prevent such diversions, and the attorney-general is authorized to bring the necessary suits to abate such encroachments. This act was a legislative interpretation of the provisions of the Colorado constitution and affected all existing as well as future appropriations within the state.

McCarter v. Hudson Co. Water Co.,
70 N. J. Eq. 525, 695; 209 U. S. 349;

Northern Pac. Ry. Co. v. Duluth, 208 U. S. 581, 596;

O'Neil v. Northern Colo. Irr. Co., 56 Colo., 545; 242 U. S., 20.

In another act of the same session of the legislature, introduced at the instance of the United States Reclamation Service, concerning co-operation in the construction of irrigation projects in Colorado, the following proviso occurs:

> "But nothing in this act contained shall be deemed or construed to grant or relinquish unto the United States any of the sovereign rights of the state of Colorado in and to the waters within its borders, or its exclusive authority over and jurisdiction and control of said waters, and the diversion, appropriation and use thereof, nor in any manner to change the methods of appropriation thereof."

S. L. Colo., 1917, Ch. 83, Section 3 page 296.

We believe the construction of the Colorado constitution above noted to be in harmony with the decisions of this court.

The sovereign rights and powers of the states newly admitted to the Union are the same as, and no greater or less than, those of the original thirteen states. No provisions in the enabling acts, under which such new states were admitted, could have the effect of limiting or restricting their sovereign powers to any greater degree than the powers of the original states were limited and restricted under the Con-

stitution, and any provision which purported to do so would be void.

United States v. Harris, 106 U. S., 629, 635;
Kansas v. Colo., 206 U. S., 46, 87;
McGilvray v. Ross, 215 U. S., 70;
Coyle v. Okla., 221 U. S., 559, 567;
Scott v. Lattig, 227 U. S., 229, 242.

Each state has full jurisdiction over the lands and the waters within its borders, and may establish for itself such rules of property as it may deem expedient with respect to the ownership of the waters, beds and banks of the streams, subject, however, in the case of navigable streams, to the paramount authority of Congress to control navigation for the regulation of commerce among the states and with foreign nations.

U. S. v. Cress, 243 U. S., 316, 319;
Kansas v. Colo., 206 U. S., 46, 93 (and cases cited);
U. S. v. Rio Grande Dam & Irrigation Co., 174 U. S., 690, 702-706;
Bacon v. Walker, 204 U. S., 311, 315;
Snyder v. Colo. Gold Dredging Co., 181 Fed., 62, 65.

The state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.

Georgia v. Tenn. Copper Co., 206 U. S., 230, 237.

The state has a right to insist that its waters and natural resources shall remain unimpaired, and it may retain what it has, and give no citizen of an adjoining state a reason for its will.

Hudson Co. Water Co. v. McCarter, 209 U. S., 349, 354;

Kansas v. Colo., 185 U. S., 125; 206 U. S., 46.

The principles last above announced have recently been elaborately and fully argued, and extended quotations from the authorities have been made in the briefs in the case of *Wyoming v. Colorado* now pending before this court, and in several other recent cases, and we rest the matter upon a general statement of the principles rather than annoy the court by extended quotations and needless repetition.

That the State of Colorado has a title in the waters of all its streams, including the North Fork of the Republican River, and has an interest therein paramount to the right, titles or interest of any of its citizens or of any foreign corporation recently deraigning title through one of its citizens or otherwise, would appear to be self-evident, and require no further discussion. As stated by Mr. Justice Holmes in the similar case of *Hudson Co. Water Co. v. McCarter*, 209 U. S., 349, 356:

> "The constitutional power of the state to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary

> is apt to be confined to somewhat rudimentary wants,and there are benefits from a great river that might escape a lawyer's view. But the state is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

We do not wish to be understood as saying that the State of Nebraska would not have the right in a proper case to call into question the acts of the State of Colorado, through the use by its citizens of the waters of the North Fork of the Republican River, in a suit instituted in this court, or that in such a suit this court would not have the jurisdiction to adjust the rights between the two states.

We likewise recognize the right of Colorado and Nebraska to settle by interstate agreement, with consent of Congress, all questions of the rights of both states upon this and similar interstate streams. (*Louisiana v. Texas,* 176 U. S., 1, 17, and *Kansas v. Colorado,* 185 U. S., 125, 140; 206 U. S., 46.)

We do urge, however, that the owner of a ditch in Colorado, diverting water from its stream, where both the person and the property are subject to its Constitution and laws, and the extent of the property rights has been determined by its courts in a suit to which the canal owner was a party, cannot by mere change of coat into the form of a Nebraska corporation, insist that Colorado shall concede to the new artificial person a greater right than the corporate

citizen theretofore held under the constitution and laws of the state; that the right of the state to immunity from suits involving its property and natural resources, may not be denied by the United States District Court through suit by a citizen of an adjoining state, and that the United States District Court of Colorado had no jurisdiction to entertain a suit which involved the title in and jurisdiction of the state over the waters of one of its streams, or jurisdiction to enter a decree forcing the executive officials of Colorado to disregard the Constitution, laws and decisions of the courts of the state and deliver the property of the state to another state and its citizens under an involuntary foreign servitude imposed by the court upon the natural resources of the state.

We respectfully urge that the property of the State of Colorado is to the same degree involved in this suit, instituted and prosecuted to final conclusion in the United States District Court against the citizens and executive officials of the State of Colorado, without its consent, and over objection raised by the respondent officials, as the property of the United States was involved in the late case of *New Mexico v. Lane*, 243 U. S., 52, where through suit against the Secretary of the Interior and the Commissioner of the General Land Office it was sought to control their action with regard to certain lands whose title was in dispute, and where, upon motion to dismiss on the ground that "The United States is a necessary party because it appears the title to the land involved in the United States" the court said (p. 58):

> "The motion should be granted on the ground that the suit is one against the

United States, under the authority of *Louisiana v. Garfield*, 211 U. S., 70."

See also: *Minnesota v. Hitchcock*, 185 U. S., 373, 387.

And further, that the same character of property of the State of Colorado (the waters of its stream) is here involved that was before the court in the many cases already cited and particularly:

Kansas v. Colorado, 185 U. S., 126; 206 U. S., 46;

Hudson Co. Water Co. v. McCarter, 209 U. S., 349;

United States v. Cress, 243 U. S., 316;

Also:

Missouri v. Illinois, 180 U. S., 208; 200 U. S., 496.

And that the effect of the decrees of the District Court and the Circuit Court of Appeals upon the natural resource of Colorado is the same as though the decree had been entered by this court in a suit properly instituted by the State of Nebraska against the State of Colorado, while here Colorado has not had its day in court (in a suit prohibited by the Eleventh Amendment to the Constitution), its property is taken away without its consent, and its officers are compelled to violate its Constitution and laws.

Without further comment we respectfully urge that the suit involves title to the property of the State of Colorado, and was prohibited by the Eleventh Amendment to the Constitution; that the decrees of

the District Court and the Circuit Court of Appeals should be reversed and that the case be dismissed.

(2)—The Decree of the United States District Court Gives Extra-territorial Effect to the Void Decree of a Nebraska Tribunal and Expropriates the Property and a Natural Resource of Colorado, Without Its Consent, for the Benefit of Citizens of Nebraska.

The suit brought in the United States District Court not only involves the title of the State of Colorado to the waters of the Colorado stream but the decree entered by that court and affirmed by the Circuit Court of Appeals, in effect, impresses upon the territory of Colorado and gives extra-territorial force and effect to the decree of a Nebraska tribunal which, though void upon its face, seizes upon, takes away and expropriates the waters of the Colorado stream, without the consent of Colorado and in disregard of her Constitution, laws and the decisions of her courts, for the benefit of Nebraska lands and the citizens of that state.

That one state or its citizens cannot thus expropriate the territory or property of a neighboring state or its citizens, would appear self-evident. But the value of the rights involved and the far-reaching effect of any precedent which may be established by the decision of this court are such that we prefer to give further consideration to the question presented.

(a)—The Decree Entered by the State Board of Irrigation, Highways and Drainage of Nebraska is Void.

The complainant, after it had been organized as a Nebraska corporation and had received conveyance

of the Colorado canal from the Colorado corporation, appeared before the District Court of Phillips County, Colorado, in the proceedings for the adjudication of water rights there pending, and as a substituted claimant for the appropriation of the canal here involved. The state District Court granted to the canal an appropriation of water as of date of April 4, 1890, for fifteen cubic feet of water per second of time for the irrigation of the lands served by the canal in the State of Colorado but refused to decree unto the complainant, as successor of the former Colorado corporation claimant, any right to divert and carry the water of the North Fork of the Republican River into Nebraska for the irrigation of lands in that state (R., 4). The state court acted in conformity with the constitution, laws and decisions of the courts of Colorado (*Lamson v. Vailes*, 27 Colo., 201; See also *Stockman v. Leddy*, 55 Colo., 24).

Complainant, the newly created Nebraska corporation, next appeared before the State Board of Irrigation, Highways and Drainage of the State of Nebraska, which has jurisdiction of the adjudication of claims of appropriation by diversion of water in that state, under the statutes of Nebraska adopted in 1895 (See Appendix, Part V) and there submitted its claim and obtained an alleged decree, not for diversion of water in Nebraska for irrigation of lands within that state, but, on the contrary, for diversion of seventy-seven cubic feet of water per second of time in Colorado at the Colorado headgate of complainant's newly acquired canal, for carriage through its canal across the interstate line and for delivery upon Nebraska lands. No notice, other than by publication

in Nebraska papers, was given to any Colorado citizen or to the State of Colorado, and neither Colorado nor any of its citizens participated in such proceeding or gave consent to the entry of any decree therein.

As we shall hereinafter observe, the so-called decree of the Nebraska Board was entered without jurisdiction and was for an amount of water nearly three times as great as the amount which the evidence before the United States District Court showed had ever been carried in the canal where it crosses the interstate line. It was to give full faith and credit to this exorbitant and void decree that the present action was filed and the United States District Court in its decree, after reducing the amount from 77 cubic feet to 29 cubic feet, impressed the alleged Nebraska decree upon the Colorado stream over the objection of the State of Colorado, and its citizens, and contrary to its Constitution and laws.

The so-called decree of the State Board of Irrigation, Highways and Drainage of the State of Nebraska was entered without jurisdiction and was void.

The duties and jurisdiction of this board are defined by the statutes of Nebraska (See Appendix, Part V). The statute limits their power to the adjudication of priorities to

> **"The public waters of the state."**
>
> Cobbey's Ann. Stat. Neb. 1909, Vol. II, p. 2164.
>
> (See Sec. 6795, Appendix, Part V).

The waters sought to be controlled by the Nebraska decree were not "public waters of the State" of Nebraska but public waters of the State of Colo-

rado, and the Nebraska tribunal had no jurisdiction over the subject matter.

The statutes of New Mexico regarding the initiation and vesting of water rights and the adjudication of priorities by a state board are similar in nearly all respects with those of Nebraska. Both of these states adopted what is commonly known as the "Wyoming System." This system leaves the adjudication of the priorities to a state board while under the "Colorado System" the adjudication is handled entirely by the courts of the state.

In the parallel case of *Turley v. Furman*, 16 N. M., 253, the jurisdiction of the state officials to grant permit to or to determine the rights of an appropriator, whose canal had its source and the first several miles of its length in Colorado and drew its water from an interstate stream rising in Colorado and flowing into New Mexico, was construed by the Supreme Court of that state. It was there decided that the board was without jurisdiction in such a case and that any action by the state officials was void. The syllabus (by the court) reads:

> "A project to irrigate lands in New Mexico from the waters of a natural stream running from Colorado into New Mexico, when the point of diversion, the headgate, and about six miles of the irrigation ditch are in Colorado, is not within the jurisdiction of the territorial engineer of New Mexico, and he is without authority to issue a permit for such a project." (16 N. M., 253.)

See also:

Lamson v. Vailes, 27 Colo., 201.

The waters of the stream are a part of the territory and within the sovereign jurisdiction of the upper state, save in so far as the exercise of its sovereignty may be called into question by the lower state in a suit between the states in this court or may be limited by interstate agreement with consent of Congress. This rule has been adhered to by Colorado (*Lamson v. Vailes*, 27 Colo., 210; *Stockman vs. Leddy*, 55 Colo., 24) and by states following the "Colorado system"; by other states following the "Wyoming system" and by the State of Wyoming.

In *Walbridge vs. Robinson*, 22 Idaho, 240, the Supreme Court of Idaho held that the state engineer had no jurisdiction to burden the Idaho stream with a diversion in Idaho for use on lands in Montana and that Montana had not right or claim to the use of the waters which constitute a part of the territory of the State of Idaho.

The State of Wyoming, through Attorney General Preston, has limited the jurisdiction of the State Engineer to the granting of permits for the use of Wyoming waters upon Wyoming territory and has held against extra-territorial servitudes.

In an opinion of January 31, 1916, to the State Engineer of Wyoming, involving an application for a permit to appropriate water in Wyoming to be conveyed across the line for use upon lands in Montana, Attorney General Preston concluded:

> "On the assumption that there was no law in Wyoming granting any right, privilege or authority to the State Board of Control to be exercised beyond the jurisdiction of the state, this office has hereto-

fore held that the State Board of Control is without jurisdiction to issue a certificate of appropriation of water for the irrigation of lands without the state.

"Your request, like the question of the jurisdiction of the State Board of Control, involves a construction of the state laws relating to the application for a permit to divert and appropriate the waters of the state to be used beyond its borders; and as heretofore construed, I am of the opinion that the State Engineer of the State of Wyoming has no jurisdiction over an application for a permit to divert and appropriate the water of the State of Wyoming, to be used on land beyond its borders, and that the approval by the State Engineer of the application above referred to would be in excess of his authority. See *Walbridge vs. Robinson*, 22 Idaho, 236."

Biennial Rep. Atty. Genl. Wyo. (1915-16), p. 75.

The property involved was not before the State Board of Nebraska. The water, whose control it sought to determine, is diverted and taken from the stream and carried for some seven miles wholly within the State of Colorado and, whenever the water in the canal crosses the interstate line, it is not water of a natural stream of Nebraska or a part of "the public waters of the state," but, as pointed out in the New Mexico case just cited, comes into the state, if at all, by reason of its diversion and carriage in Colorado,

under the jurisdiction and the laws of that state regarding its "public waters" and any water so coming across the interstate line into Nebraska is Colorado water in the charge of the canal owner and is controlled at its source by the laws of Colorado and not by the laws of Nebraska.

The dangerous effect of recognizing any such a jurisdiction in the Nebraska State Board, where neither the State of Colorado nor its citizens had notice or opportunity to appear or to be heard, is well illustrated by the case in hand. Appearing **ex parte**, insofar as Colorado and its citizens were concerned, the complainant procured from the State Board of Nebraska a so-called decree recognizing its right to divert 77 cubic feet of water from the Colorado stream and yet, when the Colorado appropriators had an opportunity to present the facts in the trial of the case in the Federal District Court, in developed that the maximum carrying capacity of complainant's canal at the interstate line was, by complainant's own witness, not to exceed 33 cubic feet per second (R., 14) and by respondents' witnesses not to exceed 24.01 (R., 15) cubic feet and the court adopted an intermediate amount of 29 cubic feet (R., 25) per second as a maximum carrying capacity of the canal at that point.

The devastating effect upon the Colorado river by impressing upon the stream a decree for nearly three times the carrying capacity of the canal is self-evident. The hazard of subjecting the streams of one state to the decrees of tribunals of a neighboring state under the theory of priority regardless of state lines, is strikingly illustrated.

But, whatever amount the Nebraska tribunal may have sought to award to complainant, it is evident that it was wholly without jurisdiction of the subject matter or of the state and its citizens whose public water it sought to adjudicate, and its alleged decree was void.

(b)—Decree of Nebraska Board Could Have No Extra-territorial Effect.

Neither the local law of Nebraska nor the orders or decrees of the tribunals created by that law could have extra-territorial effect and especially when prejudicial to the rights of Colorado and its citizens.

> "It is difficult to conceive upon what ground a claim can be rested, to give to any municipal laws an extra-territorial effect, when those laws are prejudicial to the rights of other nations, or to those of their subjects. It would at once annihilate the sovereignty and equality of every nation which should be called upon to recognize and enforce them; or compel it to desert its own proper interest and duty to its own subjects in favor of strangers, who were regardless of both. A claim, so naked of any principle or just authority to support it, is wholly inadmissible."
>
> *Story on Conflict of Laws*, Sec. 32, p. 29.

From what we have already noted it is self-evident that the so-called decree of the Nebraska State Board, even if the same were otherwise valid, would be prejudicial to the rights of Colorado and

her citizens. As stated by Judge Story, "it would at once annihilate the sovereignty and equality" of Colorado "which should be called upon to recognize and enforce" it. The so-called decree would, if put into effect, compel Colorado "to desert its own proper interest and duty to its own subjects in favor of strangers." The reckless abandon with which an exorbitant quantity of water was attempted to be awarded to the complainant by the Nebraska tribunal is evidence enough of the statement that such tribunals "were regardless" of the interest and duty of both Colorado and its citizens.

> "Now, the general rule certainly is, that every legislative act ought to receive a reasonable construction; and it cannot be presumed that a legislature authorizes any act to be done in a foreign territory, when that act is beyond the reach of its proper jurisdiction or sovereignty. Every legislature, however broad may be its enactments, is supposed to confine them to cases or persons within the reach of its sovereignty."
>
> *Farnum vs. Blackstone Canal Co.*, 1 Sumner, 46, 62.

> "The legislative authority of every state must spend its force within the territorial limits of the state."
>
> *Cooley on Const. Lim.* (7th Ed.), p. 176.

> "*Prima facie* every statute is confined in its operation to the persons, property, rights or contracts, which are within the territorial jurisdiction of the legislature which

> enacted it. The presumption is always against any intention to attempt giving to the act an extra-territorial operation or effect."
>
> *Black on Interp. of Laws*, p. 91.
>
> "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived."
>
> *Hilton vs. Guyot*, 159 U. S., 113.

The stream, the diversion, and the carriage of the water, in this case, all occur in Colorado. Unless the so-called decree of the State Board of Nebraska could operate upon the stream at the point of diversion in Colorado, its entry was a futile act. On the other hand, to give the decree any force or effect upon the diversion of the water, would be to give it extra-territorial effect and to make it reach out into Colorado and there control the stream in conflict with the constitution, laws and decisions of the courts of that state. The so-called decree was evidently of no force and effect.

(c)—The Decrees of the District Court and the Circuit Court of Appeals Expropriate the Property of Colorado, Without Its Consent, and Impose a Foreign Servitude Upon Colorado and Its Territory.

The property, natural resources and territory of one state cannot be expropriated by another state or its citizens for public or private uses in the latter state.

> 10 *Am. & Eng. Enc. Law* (2nd Ed.), p. 1051.

By the decree of the District Court, affirmed by the Circuit Court of Appeals, 29 cubic feet per second of the water of the North Fork of the Republican River, a natural resource of Colorado, necessary to the preservation and improvement of its territory and the general welfare of the state and its inhabitants, is seized upon and expropriated for the exclusive benefit of the territory and citizens of the State of Nebraska. By the decree, so affirmed, this large quantity of the already limited supply of water within the Colorado area is taken completely and absolutely from that state, against its consent and over the protest of its executive officers, and is given **perpetually** to Nebraska and its citizens for their exclusive use and benefit. By this decree the District Court perpetually enjoins the State of Colorado, through its executive officers (the respondent water officials) from in any manner interfering with the perpetual anl continued withdrawal of this large quantity of water from the Colorado portion of the stream; and directs that these water officials and their successors in office shall not deprive the complainant of any right to use this water as "recognized, defined and designated * * * in said judgment and decree of said State Board of Irrigation, Highways and Drainage of the State of Nebraska" (R., 29).

The District Court entered its decree over the protest and objection of the respondent state officials, interposed both by motions to dismiss and by answer, and thereby impressed upon the Colorado stream a perpetual servitude for the exclusive benefit of the territory of Nebraska and its citizens.

As we shall hereinafter more at length observe, this decree also compelled the executive officers of the

State of Colorado to violate the Constitution and laws of that state and, thereby, the court undertook to override the state law and to substitute its own machinery for the regulation, distribution and use of the waters of the stream in Colorado.

This action by the District Court and the Circuit Court of Appeals operated as an expropriation of the property of Colorado and impressed upon the territory of that state a foreign servitude, without its consent and over its objection. The domain of Colorado was laid hold of for the benefit of Nebraska and the property of Colorado was taken away and she was forever denied its use in order that it might be given to Nebraska for her perpetual and exclusive benefit, and this too, by a Federal District Court in a suit brought by a citizen of another state and prohibited by the Constitution.

The District Court was not confirming in the citizen of a foreign state a right long since enjoyed by that citizen within the territory of Colorado but on the contrary, in effect, bestowed upon a Colorado citizen a privilege and right denied it by the laws of the state and conferred upon the very recent grantee of a Colorado corporation an additional, exclusive and perpetual right to the use of the Colorado stream over and above ar[illegible]ghts theretofore acquired by the Colorado corporat[illegible]n under the law of its state. But even if it were claimed that this additional right existed in behalf of and was initiated by a person other than the Colorado corporation, even by a citizen of Nebraska who had initiated and still owned the alleged right, the right in him would be no greater than as here, where the appropriation had been made

by the Colorado corporation. The restriction in the Colorado Constitution against extra-territorial use of state waters was a condition running with the grant of the right to divert the water at all and was read into the property rights of the appropriator and mere forbearance from enforcing the limitations of the right by confining the use to Colorado lands would not prevent the state from asserting its own when it might so will (*Walbridge v. Robinson,* 22 Idaho, 236, 245-7).

> "No sovereign, according to modern international law, can exercise the prerogative of sovereignty in any domain but his own. * * * By the law of nations one government cannot enter upon the territories of another, or claim any right whatever therein."
>
> *Wharton Int. Law Digest,* Vol 1, p. 38-39.

That the District Court exceeded its powers by attempting to confer upon complainant rights in addition to those which its predecessor had obtained under the laws of Colorado and to which it was limited by the laws of the state, and by, in effect, expropriating the property of Colorado and its citizens for the exclusive benefit of complainant, is well illustrated in a number of cases.

Crosby vs. Hanover, 36 N. H. 404, 423, involved the right of officers of New Hampshire to expropriate territory of Vermont for abutments of an interstate bridge:

> "Our courts and the officers of our laws have no jurisdiction as such to do any act or

take any property in that state. Our official powers are confined to the limits of our own state, and the court in this case cannot require or authorize the town to go into Vermont to take the property of the corporation there, and the commissioners had no power to condemn property situated in that state. They could take the franchise of the corporation, because that exists in this state, and by its laws; and they could take all the property in this state necessary for the purposes of building the bridge; but they had no jurisdiction or power beyond the limits of the state."

In *Holyoke Water Power Co. v. Connecticut River Co.*, 52 Conn., 570, 575-6, it was said:

"The question has arisen whether by virtue of the right of eminent domain, one state can take, or subject to public use, land in another state, and the decisions have naturally been against such a power. (Citing cases.) * * * The state obtains by virtue of its governmental powers no control over or right to injure land without its jurisdiction. * * * As Connecticut has no direct jurisdiction or control over real estate situate in another state, **it cannot indirectly,** by virtue of its attempted improvement of its own navigable waters, control or subject to injury foreign real estate." (52 Conn., 575.)

In *Manville vs. Worcester*, 138 Mass., 89, 90, the court, speaking through Mr. Justice Holmes, while

recognizing the claim of a mill owner in Rhode Island against the withdrawal of waters from a stream in Massachusetts on the ground of common assent by both states, recognized the right of Massachusetts to have refused consent for the burdening of its streams by foreign servitudes as Colorado has refused by its Constitution, statutes and the decisions of its courts (See Appendix, Parts I, II and III), and that Rhode Island would have no right by its laws to diminish freedom of action in Massachusetts:

> "Of course the laws of Rhode Island cannot subject Massachusetts lands to a servitude, and apart from any constitutional considerations, if any there be, which we do not mean to intimate, Massachusetts might prohibit the creation of such servitude, or it might authorize any acts to be done within its limits, however injurious to lands or persons outside."

We respectfully urge that Colorado has, in most unmistakable language by its Constitution, laws and the decisions of its courts, prohibited the recognition of such extra-territorial servitudes and has "authorized any acts to be done within its limits, however injurious to lands or persons outside." Colorado has consistently insisted, from its admission as a state in 1876, that it reserves the waters of its streams for itself and its people free from servitudes for the benefit of citizens of other states and that its most valuable natural resource shall be retained and used for its own self-preservation to the fullest degree and subject only to whatever adjustment may be necessary

with neighboring states (not citizens of those states) either by interstate agreement, with consent of Congress, or by suit between the states in this court. The suit and the decree of the District Court here involved directly effect this reserved public property of Colorado, expropriate a part of that property for Nebraska lands without the consent and over the objection of Colorado and impress upon Colorado and its territory a foreign servitude and compel its officers to recognize that servitude in the face of contrary laws of Colorado. This is imposed upon Colorado and its territory in a suit to which the State of Colorado is not a party and which is prohibited by the Eleventh Amendment to the Constitution of the United States.

(Cases Similar to One at Bar.)

That the decree of the District Court amounted to an expropriation of Colorado territory, and impressed upon that territory a perpetual servitude, without its consent, coupled with the principle that the District Court had no authority to give extra-territorial effect to the so-called decree of the Nebraska Board, has authority in the following cases:

McCarter v. Hudson Co. Water Co., 70 N. J. Equity, 695, 717;

Grover Irrigation Co. v. Lovella Ditch Co., 21 Wyo. 204;

Opinions of Attorney-Generals (U. S.), Vol. XXI, p. 280-283.

Lamson v. Vailes, 27 Colo., 201;

Turley v. Furman, 16 N. M., 253.

McCarter v. Hudson Co. Water Co., 70 N. J. Equity, 695, 717, involved an attempt to extract certain water from the Passaic River, a New Jersey stream, for carriage to consumers upon Staten Island in New York against the will of the people of New Jersey, as expressed by a statute similar to the 1917 law of Colorado. (See Appendix, Part II.) The claim of right to divert New Jersey water for use in New York was denied, and the decision was affirmed by this court (209 U. S. 349). The facts in that case differ from those in the case at bar only in that the Passaic River was an intrastate stream of New Jersey, while the North Fork of the Republican River is an interstate stream, and also by reason of the fact that the diversion from the New Jersey stream was for domestic use, while irrigation is here involved. The interstate character of the stream here involved, as we are advised, does not change the principle of law now under discussion, as the manner or extent of the Colorado use of this stream may only be called into question by Nebraska in a suit in this court, and not by some private citizen of Nebraska suing the state officials in the District Court (*Kansas v. Colorado*, 206 U. S., 46, and the cases *infra*.) Insofar as this case is concerned the stream is a part of the territory of Colorado to as great a degree as though it entered the sea within the state. The second difference is merely one of the degree of the necessity of the use, and it may be observed that the domestic needs of the people of New York for the water of New Jersey are doubtless more imperative than is the irrigation need of the people of Nebraska for the use of the water of the Colorado stream. In the arid

region, appropriations are recognized for all beneficial uses, the highest of which is domestic, and the next irrigation, and the domestic character of the use of the water to be diverted from New Jersey and the greater necessities of the people of Staten Island require application of even stronger principles than would be necessary in this case. It may be further observed that in the New Jersey case, as in the Hudson Water Company had contracted with the New Jersey Company before the suit was instituted, much as the complainant here contends that it received its conveyance from the Colorado corporation prior to the institution of suit in the District Court.

After a discussion of the right of the state to preserve the water supply of its streams for the use of its people, the New Jersey court, speaking through Mr. Justice Pitney, said (p. 717):

> "Stripped of all circumlocution, what is asserted is the right of the people of New York to derive an artificial water supply from the territory of New Jersey without the consent of the people of this state. This argument, however, is at once overthrown by reference to the established principle that one state cannot expropriate for its public purposes property within the territory of another state." (Citing cases.)
>
> "To admit that the people of the State of New York have any inherent right to gain a water supply from the lakes or streams of New Jersey by means of an artificial aqueduct constructed for the purpose is to assert that the sovereignty of New York extends to

some extent and for some purposes over the soil of New Jersey. To state the proposition is to refute it. Such interstate rights can be acquired only by interstate compact.

"We have been privileged to see in print an opinion recently submitted to the Merchants' Association of New York by Mr. Randolph, author of the well-known work on eminent domain, upon the question of an interstate water supply for that city. Refering to 'that interest in water which each state possesses as the guardian of its community,' he says:

" 'I think it is clear that the right of an individual or corporation to divert water, whether gained by public grant **or by prior appropriation,** is presumed to be utilized within the state, which may forbid the carriage of the water beyond its bounds.'

"And he uses this language:

" 'And when we point out that each state holds all the property in its territory free from the eminent domain of another and cannot be compelled to surrender its property to another in any way, I think we approximate the irreducible measure of sovereignty in this relation.' " (70 N. J. Eq. 717.)

After discussing the cases of *New York v. Pine*, 185 U. S., 93, and *Kansas v. Colorado*, 185 U. S., 125, Justice Pitney concluded (p. 719):

> "But whatever recognition these two important decisions imply of the right of one state to prevent another state from interfering with the natural flow of a river in which the complaining state has an interest, is directly opposed to the contention of the appellant here, for what it is asserting, in effect, is the right of citizens of the State of New York to interfere with the natural flow of one of the rivers of New Jersey, without the consent, and contrary to the express prohibition of the people of the latter state." (70 N. J. Eq. 719).

Grover Irrigation Co. v. Lovella Ditch Co., 21 Wyo., 204, involved condemnation proceedings by Colorado corporation, brought for the purpose of condemning rights of way for its canal in Wyoming for the purpose of diverting the waters of Crow Creek, an interstate stream rising in Wyoming and flowing into Colorado, for use primarily upon lands situate in Colorado. The Supreme Court of Wyoming denied to the Colorado corporation the right to expropriate the Wyoming territory for the benefit of Colorado lands. In a sixty-page opinion, Justice Potter, in part, said:

> "Eminent domain is generally defined as the right or power of a sovereign state to appropriate private property to particular uses, for the purpose of promoting the general welfare. * * * In this respect the several states are distinct, and independent of each other, respectively possessing and ex-

ercising the power for their own purposes or their own welfare.

"'The eminent domain in any sovereignty exists only for its own purposes.' (Page 240.)

"It is also well settled that a state cannot take or authorize the taking of property or rights in property situated in another state.

"'One state cannot expropriate for its public purposes property within the territory of another state.' (Citing *McCarter v. Hudson Co. Water Co., supra.*) (Page 247.)

"The irrigation of land in a neighboring state * * * may no doubt result in some benefit to the people of this state, but only in the general way that one state is benefited by the growth in industrial activities, population and wealth of an adjoining state, or even of a more distant state or the nation at large. * * * The headgate and ditch by which water for agricultural purposes is diverted and distributed is not the use for which land required for a right of way is taken; the use authorizing such a taking is the application of the water to the land. * * * If located in another state the use is there, and that use must support the exercise of eminent domain for a right of way for the ditch, if it is to be supported." (Page 255-6.)

After stating that the water to be diverted could be used entirely in Colorado; that the power of emi-

nent domain would not be exercised by Wyoming except for its own purposes; that Colorado could not exercise the power in Wyoming, and that any authority conferred by its laws so to do would be void, for the reason that any government "is limited to persons and property within the territory it controls," and after stating that there were vast areas of land in Wyoming yet uncultivated and capable of irrigation and reclamation, he continued (page 260):

> "Since the purpose is solely to irrigate lands in another state, it is not material that the headgate is to be located but a short distance above the southern boundary line of this state, or that the lands to be irrigated are located just over the line in the adjoining state. **It would make no difference in principle if it was proposed to divert the water from some stream in the interior or elsewhere in our state much farther removed from the lands to be irrigated, or if it was proposed to irrigate lands in another state situated at a greater distance beyond our territorial limits.**"

After holding that the laws of a state have no extra-territorial effect and that it is not necessary for a state statute to contain words expressly confining its operation within the state, he denied to the Colorado corporation any right to exercise eminent domain in Wyoming and thereby prevented the Colorado canal from diverting water in Wyoming for use upon lands in Colorado, although the waters were those of an interstate stream flowing into Colorado and the ditch in question was situate below all Wyo-

ming diversions, as is the canal of complainant in the case at bar.

Grover Irr. Co. vs. Lovella Ditch Co., 21 Wyo., 204, at pages cited.

The opinion of former Attorney General Judson Harmon, *Opinions of Attorney General*, Vol. XXI, p. 280-3, is of especial interest as a broad exposition of the principle of law here involved. While that opinion involved a dispute over the waters of an international stream, nevertheless, it would appear to be applicable inasmuch as the case at bar involves the water of a stream common to two states of the Union, which are, save for national purposes to be regarded as separate nations (*New York vs. Miln*, 11 Pete., 102, 139; *Chisholm v. Georgia*, 2 Dal., 419, 435; *Kansas v. Colorado*, 206 U. S., 46). Mexico had claimed the water of the Rio Grande River flowing in the United States by reason of alleged prior appropriation in Mexico. In his opinion Judge Harmon in part said:

> "What is really contended for is a servitude which makes the lower country dominant and subjects the upper country to the burden of arresting its development and denying to its inhabitants the use of a provision which nature has supplied entirely within its own territory. * * * So strongly is the principle of general and absolute sovereignty maintained that it has even been asserted by high authority that admitted international servitudes cease when they conflict with the necessities of the servient state. * * * No believer in the doctrine of nat-

> ural servitudes has ever suggested one which would interfere with the enjoyment by a nation within its own territory of whatever was necessary to the development of its resources or the comfort of its people. * * * The rules, principles, and precedents of international law impose no liability or obligation upon the United States."

The right of Mexico, under claim of prior use, to compel the United States to turn down the waters of the Rio Grande River was denied.

Op. Atty. Genl., Vol. XXI, p. 280-3.

Lamson vs. Vailes, 27 Colo., 201, and *Turley vs. Furman,* 16 N. M., 253, involve the question of the rights of Colorado and New Mexico to control and administer the waters of streams common to both states. They agree in their construction of the law in such cases.

In *Lamson vs. Vailes,* Justice Campbell said (page 204):

> "It is not to be supposed that the state (Colorado) was legislating for the reclamation, or irrigation, of lands beyond its boundaries, or making provisions by the way of police regulations * * * over a territory beyond its jurisdiction."

In *Turley vs. Furman,* Mr. Justice McFie quoted from an opinion of the Attorney General of New Mexico (page 263):

> " 'It cannot be possible that we ought to permit Arizona to come into New Mexico and take away out of our territory New Mexican waters for use elsewhere, when there are New Mexican lands upon which we can use it, and our local statute certainly does not contemplate any such suicidal proceedings.' "

He then said:

> "If this is good law, and it seems to be such, the State of Colorado has certainly the same rights, and it is for the State of Colorado and not the territorial engineer of New Mexico, to determine whether or not there are lands in that state upon which the waters sought to be diverted by the Turley project can be used beneficially, and the dictum of the engineer cannot deprive Colorado of this right."

In *Stockman vs. Leddy,* 55 Colo., 24, Mr. Justice Campbell construed the case of *Lamson vs. Vailes, supra,* in which he had written the opinion, and held that there was nothing inconsistent with the conclusion (page 28):

> "That the waters of the natural streams of this state belong to the people, to the state, in its sovereign capacity, and that its right to their distribution and control within its borders is free from any interference by any other sovereignty."

If it be true, and we urge that such is the fact, that the State of Colorado has title to the waters of

its streams and that as to those that are interstate in their character, its control can only be called into question by a neighboring state in a suit in this court and the United States District Courts have no jurisdiction to entertain suits which have the effect of determining, in part or in whole, the right of the state to distribute the waters of its streams according to its Constitution and laws; and if it be true, as we assert the fact to be, that the effect of the decree entered by the District Court in this case is that of seizing upon a large part of the waters of the Colorado stream, without its consent, and giving the same in perpetuity to Nebraska and her citizens to the deprivation of Colorado and to the advantage of Nebraska, it would appear that the suit not only affects the title of the state to the waters of the North Fork of the Republican River, but that the decree entered by the District Court and affirmed by the Circuit Court of Appeals amounts to an expropriation of the waters of Colorado for the benefit of Nebraska and her citizens and that the District Court was without jurisdiction to entertain the suit or thereafter to enter the decree whereby the waters of the Colorado stream were so expropriated and whereby the Colorado water officials were compelled to obey, not the Constitution and laws of Colorado, but, on the contrary, the will and order of the Federal Court.

(3)—No Rights or Privileges Secured to Complainant by the Constitution and Laws of the United States Involved.

The suit was brought by complainant upon the alleged ground:

> "To obtain redress for the deprivation by defendants, under the color of the laws and statutes of the State of Colorado, of the rights and privileges of the complainant, secured to it by the Constitution and laws of the United States providing for the equal rights of citizens of the United States and of persons within the jurisdiction of the United States, to carry on commerce between the State of Colorado and the State of Nebraska, and particularly the right of complainant to divert water, and to transport, carry and sell the same to the citizens of the State of Colorado and the State of Nebraska for agricultural and domestic purposes."

The District Court decreed:

> "This suit was brought to obtain redress for the deprivation by defendants of rights and privileges secured to complainant by the constitution and laws of the United States, and **as a suit under the laws of the United States.**"

The rights here involved are merely those rights to divert the waters of the State of Colorado for beneficial uses by the "people of the state" which the Constitution and laws of Colorado conferred upon its corporate creature, The Haigler Land and Canal Company. This corporation had its very birth and its existence under Colorado law and was limited in every right and power it possessed by the law of its creation. It could acquire no other rights to the

diversion and use of Colorado waters than those granted it by the law of the state. If it exceeded those rights and conveyed water to lands outside of the state it gained no vested right to continue its *ultra vires* acts. If the state and its citizens permitted it to take into its canal all the water which remained in the stream after all other users no longer needed the water, purely by reason of the fact that this canal was the lowest considerable diverter from the stream in Colorado and no lower appropriator was injured, this infraction of the Colorado law could bestow no vested right to continue the evil and the state was not estopped to further refuse the gratuity. So long as the water was not needed in Colorado it could injure no one in that state if the canal took what was left after use by those above, and to have compelled the water, in excess of the needs under the Colorado portion of the canal, to have flowed down the stream past the headgate of the canal and into Nebraska would have profited no one.

But as we have previously noted, any appropriator, whether a citizen of Colorado or Nebraska, would have gained no greater rights than did the Colorado appropriator. The limitation upon the right to divert and use the waters of the stream of the state for the benefit "of the people of the state" was a condition and limitation running with the right to use the waters of the stream at all and was read into and formed a part of the right and mere user of Colorado water upon extra-territorial lands by the appropriator gained him no vested right to continue so to do.

McCarter v. Hudson Co. Water Co., 70 N. J. Eq., 695, 719;

Stockman v. Leddy, 55 Colo., 24, 27;
Walbridge v. Robinson, 22 Idaho, 236, 245-7.

But, in a new state whose lands are arid and whose population is constantly increasing, it soon becomes a matter of grave importance to preserve the use of every natural resource for the health, prosperity and general welfare of the state and its people and the time comes when the state is called upon to husband its waters to supply the necessities of its people and to irrigate the otherwise fertile acres within its territory in order that its people may find sustenance and the state may be maintained.

As stated by Vice Chancellor Bergen in *McCarter vs. Hudson Co. Water Co.*, 70 N. J. Eq., 525, 533:

> "The constant increase of our population, considered in connection with the unchanging extent of our water-shed, and the consequent limit of the natural supply of water necessary for domestic and healthful purposes, may justly alarm the state with regard to the future, and a neglect to insist upon its rights in the past, when conditions did not require a strict enforcement of its privileges, works no estoppel, and justifies the restriction of the appropriation of its property."

In the language of Justice Ailshie in *Walbridge vs. Robinson*, 22 Idaho, 236, 246:

> "In the case at bar, a right is urged to enjoy the use of state property or a natural

> resource of the state (waters of . streams) beyond the jurisdictional border of the state and within the confines of anot . state. A gift or grant of state property or a public franchise, or a right which m emanate from the sovereignty representi the whole people, ought not to arise by me inference or failure of the sovereignty to speak on the subject. On the other hand, a failure to speak on the subject or to confer the right in specific terms ought to be construed in favor of the state and against those claiming the right." (Citing *Endlich on Interpr tation of Statutes* (1888) p. 497 and *Bl . on Interpretation of Laws* (1896) p. 109).

The waters of the streams of Colorado are reserved to its people and to assert th this Colorado corporation acquired any greater vest d rights than it could obtain under the laws of its own state and in which its appropriation was made, to refute the assertion. And to assert that the newly formed Nebraska corporation could have any grea er rights than its grantor is its own denial.

(a)—Equal Rights Are Not Denied Complainant.

The equality of privileges a d immunities guaranteed citizens of the several state by Article IV, Sec. II, of the Constitution of the United States is not denied complainant.

The Colorado corporation, which constructed the canal in question and operated it until shortly prior to the commencement of this actio had certain

well defined and limited rights under the Constitution, laws and decisions of the courts of Colorado. These rights included the right to take water from the Colorado stream and make beneficial use of it within the state and to be protected in such right in the order of priority of diversions within that state. The right to appear before the state court and have the status and extent of its appropriation determined and fixed by decree was also afforded. (See Colo. Statutes, Appendix, Part IV.) In no part of either the Constitution or laws of the state and by no decision of its courts was the right of diverting water from the Colorado streams for carriage into other states either granted or approved. On the contrary, the Constitution specifically reserved the waters of the state "to the use of the people of the state" (see Appendix, Part I), the decisions of its courts denied any such right (*Lamson v. Vailes*, 27 Colo., 201; *Stockman v. Leddy*, 55 Colo., 24), and finally the statutes have positively forbidden any such diversion (S. L. Colo., 1917, Ch. 151, p. 539).

At the time the canal was constructed by the Colorado corporation, it could acquire no rights to water in Nebraska, as such rights were limited to Nebraska corporations. (See Appendix, Part V, L. 1889.)

The Nebraska corporation, by its conveyance, took no more than the Colorado corporation had to convey, and would have no right to insist on greater rights in the Colorado stream than those possessed by its predecessor in title. The same limitations on the right to divert the waters of the Colorado stream continued when the property came into the hands of

the Nebraska corporation, to the same degree (no more and no less) that they defined the property interests and the grant of privileges of and to the original Colorado claimant. The mere change of repository of title in no manner enhanced the estate or gave it new or additional rights, privileges or immunities, and we digress to suggest that it would seem a strange and a new doctrine for the United States District Court to hold that the mere change of citizenship of the user of Colorado water, under license from the state, could confer upon the new repository of title some greater right or privilege than that of its predecessor, and that the court might thereupon impress some new, additional and foreign servitude upon the territory and natural resources of Colorado merely by reason of the fact that the Colorado citizen had conveyed the property to a citizen of Nebraska. Such, nevertheless, in effect was the action of the District Court in the case at bar.

The newly created Nebraska corporation (complainant here) has been afforded the same rights and privileges previously enjoyed by the Colorado corporation in the diversion and use of the water of the Colorado stream. The Colorado corporation had the right, under the Constitution and laws of Colorado, to use the waters of the North Fork of the Republican River to the extent of the needs of its Colorado lands, and no more, in the order of the priority of his appropriation with regard to other users from the same stream within the State of Colorado. The complainant still has the same right and has been protected therein. The Colorado corporation gained no right against the state or its citizens by, of its own motion, taking a

part of the residue of the waters of the Colorado stream out of the state for use on Nebraska lands until such time as Colorado should need the water for newer and later users, and its grantee, complainant, became invested with no such right by the mere conveyance of the property.

The Colorado appropriator had the right, and it was its duty, by the laws of the state under which it existed and from whose streams it had its limited right of use of water, to appear before the state courts in the statutory adjudication proceeding, and there make its claim and procure a decree confirming the same. This the Colorado appropriator did and, prior to the entry of the decree, its grantee (complainant here) was substituted and likewise submitted to the jurisdiction and became a party to the proceeding to the same degree and with all the rights (but no more) of its grantor. The state court had no power to burden the territory of Colorado and its stream with a foreign servitude in behalf of an appropriation by a Colorado citizen or a citizen of any other state (*Lamson v. Vailes*, 27 Colo., 210; *Stockman v. Leddy*, 55 Colo., 24), and the same limitation applied to the Nebraska grantee of the Colorado citizen, and by its decree the state court limited the rights of the Colorado canal, but recently purchased by the new Nebraska corporation, to the same degree as those rights were by the state law limited in the hands of the Colorado citizen.

And, finally, the complainant had the right, as a party to the proceeding, to have any errors in the decree of the state court reviewed by the Supreme Court of the state, but it took no such steps, abided the

judgment of the state court, and proceeded to accomplish indirectly that which it could not obtain directly, by filing suit in the United States District Court, and procuring a decree from that court in effect overruling the state court and impressing upon the Colorado stream a perpetual servitude for Nebraska lands, contrary to the Constitution and laws of Colorado.

It thus appears that complainant has not only been afforded equal privileges of the Constitution and laws of Colorado, but more, that it has been granted privileges superior to and unequal with those permitted the citizens of Colorado and has been, by the decree of the United States District Court, protected in doing what citizens of Colorado are prohibited from doing, and has been justified in standing in defiance of the Constitution and laws of Colorado. That the District Court exceeded its jurisdiction would appear self-evident.

Decree of State Court Conclusive and Res Judicata and Suit in District Court a Collateral Attack.

As we are advised, the State of Colorado has the exclusive right to determine its own rules of property in the ~~waters of its~~ streams, and the construction and interpretation of its Constitution and statutes by its courts is conclusive in the courts of the United States.

Hardin vs. Jordan, 140 U. S., 371;
St. Anthony Falls W. P. Co. vs. St. Paul Water Comm., 168 U. S., 349;
Lowndes vs. Huntington, 153 U. S., 1, 19;
Whitaker vs. McBride, 197 U. S., 510, 512;

Clark vs. Nash, 198 U. S., 361, 367;
Kansas vs. Colorado, 206 U. S., 46, 93-95;
McGilvra vs. Ross, 215 U. S., 70, 78;
Marshall Dental Co. vs. Iowa, 226 U. S., 460, 461;
United States vs. Cress, 243 U. S., 316, 319;
Farmers Irr. Dist. vs. Nebraska, 244 U. S., 325, 330.

When the District Court took jurisdiction of the suit at bar, the bill of complaint recited the entry of the decree by the state court, limiting the rights of complainant's canal to the irrigation of lands in Colorado (R., 4). The jurisdiction was challenged by motions wherein this fact was asserted (R.,7) The judgment of the state court and its conclusive effect was raised by answer (R., 9) and asserted on the trial. But the District Court, nevertheless, decreed in complainant a greater right than that permitted its grantor or which could have been permitted any appropriator under the Constitution and laws of Colorado, and, by its injunction, compelled the state officials to act in disobedience of the laws of their state.

The decree of the state court was conclusive upon the complainant and its predecessor, both of whom were parties to the adjudication proceedings before the state court, and the suit at bar was a collateral attack upon the conclusive judgment of a state court having jurisdiction of both the parties and the subject matter.

> "It has been so frequently determined by this court that, except as specially pro-

vided by the statutes, or in case of fraud, decrees rendered in statutory proceedings under the Irrigation Act are conclusive upon the parties thereto, that an extended discussion of the question would not seem necessary." (Citing many cases.)

Farmers Union Ditch Co. vs. Rio Grande Canal Co., 37 Colo., 512, 515;

See also:

O'Neill vs. Northern Colorado Irr. Co., 56 Colo., 545; 242 U. S., 20.

Complainant took no appeal or writ of error from the judgment of the state court but abided the decision (R., 4).

The suit at bar is a collateral attack upon the decree of the state court, and by its decree the District Court, in effect, sets aside the decree of the state court, which was conclusive upon both the parties and the subject matter, and substitutes its own decree for that of the state.

We urge that the XXVIII assignment of error

"Because the United States Circuit Court of Appeals * * * erred in affirming the decree of the United States District Court,"

here applies. The complainant was bound by the decree of the state court entered in the proceeding for adjudication of rights for diversion of the waters of the North Fork of the Republican River, including the right of complainant's canal, and to which pro-

ceeding complainant and its predecessor were parties. Final decree in the proceeding in the state court was entered July, 1912, more than a year prior to the commencement of this suit in the District Court. The state court had jurisdiction of both the parties and the subject matter, and proceeded to final decree and made final disposition of "all other questions of law and questions of right growing out of or in any way involved or connected" with the rights of complainant. (See Sec. 3276, *Rev. Sta. Colo.*, 1908, Appendix, Part IV.) If complainant was dissatisfied with the judgment of the state court it should have caused the decision to be reviewed before the Supreme Court of Colorado and, if dissatisfied with the decision of that court, and believing some Federal question to be involved, it should then have brought the matter before this court for review. But complainant did not so proceed. It abided the decision of the state court and later brought this suit whereby the District Court in effect annulled the decision of the state court, particularly in its effect on other water users in Colorado who were also parties to the adjudication proceedings, and in so doing also compelled the state officials to distribute water to the canal of complainant in violation of the laws of Colorado and to the deprivation of other users in Colorado. The plea of *res adjudicata* entered by the answer of respondents (R., 9) would appear to have been well founded.

It is evident that the complainant was afforded not only the equal protection of the laws of Colorado, but more, was afforded privileges denied to the citizens of Colorado.

(b)—No Rights of Interstate Commerce Involved.

Complainant alleged that the action in the District Court was brought to obtain redress for deprivation of complainant's right

> 'to carry on commerce between the State of Colorado and the State of Nebraska, and particularly the right of complainant to divert water, and to transport, carry and sell the same to the citizens of the State of Colorado and the State of Nebraska for agricultural and domestic purposes,"

and that it was deprived of the right so to do, secured to it by the Constitution and laws of the United States. In other words, it invokes Par. 3, Sec. VIII of Art. 1 of the Constitution, commonly known as the "interstate commerce clause."

At the outset four underlying infirmities in the assertion of any rights in complainant under this clause of the Constitution are self-evident:

> (1) The stream here involved is non-navigable;
>
> (2) The rights claimed are to divert waters wholly within Colorado, and to convey the same for uses in that state, and thereafter to carry these waters for uses in Nebraska, contrary to the Constitution and laws of Colorado;
>
> (3) The alleged rights, complainant conceded, were acquired long after the admission of Colorado as a state of the Union, and long after the adoption of its Consti-

tution and the enactment of its laws, and were acquired by a corporation organized, existing and doing business, up to the time of the conveyance to complainant, under the Constitution and laws of Colorado, and which made its appropriation wholly subject to and limited by that Constitution, and laws and **not** under any law of the United States governing territories; and

(4) All lands in Colorado which are riparian to the stream passed out of government control by patent prior to the initiation by the Colorado corporation of the rights now claimed by complainant by recent conveyance (R., 18).

The complainant does not allege that by any act or omission of respondents it has been deprived of any rights guaranteed to it by the Constitution and laws of Colorado, and, on the contrary, specifically alleged its complaint to be that the official respondents refuse to concede it any greater rights than those adjudicated to it under the laws of Colorado, viz.: the right to use 15 cubic feet per second of time, or so much thereof as shall be necessary for the irrigation of all Colorado lands served by complainant's canal, under its priority of right confirmed in it for local administration of the waters of the stream in Colorado.

The claim of deprivation is wholly by reason of an alleged deprivation of a claim to additional water for carriage into another state for sale in that state, contrary to the laws of Colorado under which every

right that complainant possesses must have had its origin. In other words, the complainant sought and obtained from the District Court a decree granting it a right to deprive all other users of water from the stream in Colorado, who are junior in priority, from diverting water until complainant has sufficient to fill its claims for transportation into a neighboring state, and the state officials are, in effect, required to allow the fields in Colorado to remain arid while the waters of the state are extracted for carriage into another state, under claim of interstate commerce.

The charge of interference with interstate commerce is answered by the fact that complainant's predecessor, the Colorado corporation, could acquire no right in the waters of the Colorado stream contrary to the Constitution and laws of the state under which it was organized and in which its diversion was made, and complainant could acquire no greater right than that obtained from its predecessor, under whose appropriation all of complainant's rights vested.

Furthermore, even if the diversion had been in Nebraska, the Colorado corporation could have gained no right to the use of water in Nebraska at the time the canal in question is said to have been constructed (1890), by reason of the fact that only those corporations organized under the laws of that state (Nebraska) were then permitted to construct canals or make appropriations in that state and no right by the Colorado corporation was or could have been acquired. (See Nebr. L., 1889, Sec. 1, Appendix, Part V.)

As we are advised, a natural resource of the state, set apart and dedicated to the use of the people

of the state, cannot be made the subject of interstate commerce by the mere will or desire of a citizen, and whatever complainant's predecessor may have desired to do with the waters of the Colorado stream, its rights were limited by the law of its state and its subsequent conveyance to the complainant would confer no additional right.

The principle here involved is much the same as that determined in *Geer v. Connecticut*, 161 U. S., 519, which involved the authority of the State of Connecticut to insist that its game should be held for the exclusive use of its citizens, and prohibited interstate commerce therein. The Constitution of Colorado, adopted long prior to the initiation of any rights here involved, specifically declared the water of every natural stream within the State of Colorado "to be the property of the public," and the same was "dedicated to the use of the people of the state," subject to appropriation as therein provided.

In the above case the game of the state was adjudged to be under the control of the state "as a trust for the benefit of the people," and in exercising control over the game the state was held to represent the people, and ownership of the game was "that of the people in their united sovereignty" (p. 529). It was there argued that inasmuch as intrastate transportation of game was permitted, the state might not prohibit the interstate transportation of the same. In the case at bar, it is, in effect, asserted that interstate commerce in water of the Colorado stream is permissible and a proper subject of interstate commerce by reason of the fact that intrastate use of the water of the Colorado stream, in the order of

priority, is permitted. Mr. Justice White thus disposed of the contention in the above mentioned case (p. 530):

> "But the errors which this argument involves are manifest. It presupposes that where the killing of game and its sale within the state is allowed that it thereby becomes commerce in the legal meaning of that word. In view of the authority of the state to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property and its common ownership by all the citizens of the state, it may well be doubted whether commerce is created by an authority given by a state to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the state. **The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose.** The qualification which forbids its removal from the state necessarily entered into and formed part of every transaction on the subject, and deprived the mere sale or exchange of these articles of that element of freedom of contract and of full ownership, which is an essential attribute of commerce. * * * granting that the dealing in game killed within the state, under the provision in question, created internal state commerce, it does not follow that such internal commerce became necessarily the subject matter

> of interstate commerce, and, therefore, under the control of the Constitution of the United States. **The distinction between internal and external commerce and interstate commerce is marked, and has always been recognized by this court** * * *.
>
> "The fact that internal commerce may be distinct from interstate commerce, destroys the whole theory upon which the argument of the plaintiff in error proceeds. The power of the state to control the killing of and ownership in game being admitted, the commerce in game, which the state law permitted was necessarily only internal commerce, since the restriction that it should not become the subject of external commerce went along with the grant and was part of it. All ownership in game killed within the state came under this condition, which the state had the lawful authority to impose, and no contracts made in relation to such property were exempt from the law of the state consenting that such contracts be made, provided only they were confined to internal, and did not extend to external commerce" (161 U. S., 530-32).

In the following pages he discusses various authorities, and further holds that the right to preserve the game of the state

> "flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into

> play, because by doing so interstate commerce may be remotely and indirectly affected" (161 U. S., p. 534).

In the case at bar the water of the Colorado stream was reserved for the use of the people of the state by constitutional provision in 1876. Thereafter various laws were passed putting into effect this constitutional provision. (See Appendix, Part IV.)

The only rights which complainant has ever had to the use of the stream were initiated in 1890 by its predecessor, and necessarily the constitutional provision restricting the use of the water of the stream "to the people of the state" was read into the right, and formed a limitation upon the appropriation by the Colorado corporation. The very nature of the property, as well as the declaration of public ownership and dedication to the use of the people of the state, would forbid the water of the Colorado stream from being extracted for purposes of interstate commerce. This is especially true in view of the crying necessities of the Colorado territory where the water is required for the irrigation of its lands as well as for the domestic uses of its people. As expressed by Mr. Justice White in the above quotation:

> "The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose" (161 U. S., 530).

In *Hudson Co. Water Co. v. McCarter*, 209 U. S., 349, the right to convey the waters of a New Jersey stream into New York for the use of the inhabitants

of that state was claimed to be within the protection of the interstate commerce clause of the Constitution, and in that case, as here, so-called vested rights were involved, as well as the contention imposed in the case at bar to the effect that the complainant was denied "equal privileges" with the citizens of New Jersey (and Colorado). Mr. Justice Holmes said (p. 357):

> "The other defenses also may receive short answers. A man cannot acquire a right to property by his desire to use it in commerce among the states. Neither can he enlarge his otherwise limited and qualified right to the same end. The case is covered, in this respect, by Geer v. Connecticut, 161 U. S., 519, and the same decision disposes of the argument that the New Jersey law denies equal privileges to the citizens of New York. It constantly is necessary to reconcile and to adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others, as we already have said that it is necessary to reconcile and to adjust different principles of the common law. See Asbell v. Kansas (209 U. S., 251). The right to receive water from a river through pipes is subject to territorial limits by nature, and those limits may be fixed by the state within which the river flows, **even if they are made to coincide with the state line.** Within the boundary, citizens of New York are as free to purchase as citizens of New Jersey. But this question does not concern the defend-

ant, which is a New Jersey corporation." (209 U. S., 357.)

Referring to the last sentence of the above quotation, to the effect that the defendant was not concerned because it was a New Jersey corporation, it may be noted that the same observation here applies for the reason that the rights which complainant asserts are the rights which it recently received by conveyance from the Colorado corporation; but were it otherwise, the same rule would apply as the rights of the appropriator were limited by the laws of Colorado.

In the New Jersey case above noted, the diversion was from a stream wholly within that state, but, as we have previously observed, insofar as this case is concerned, the rights are to be determined upon the same basis and as though the stream were wholly in Colorado. In other words, the title of the State of Colorado to the waters of its streams and the use thereof, under its Constitution and laws, may not be called into question by a suit in the District Court by a private citizen of a foreign state. Such a suit is prohibited by the Eleventh Amendment to the Constitution. Any rights which Nebraska and its citizens may claim in the Colorado waters are to be determined in a suit in this court between the two states (*Kansas v. Colorado*, 206 U. S., 46), or determined by an agreement between the states, entered into by consent of Congress. As stated by Mr. Justice Brewer in *Kansas v. Colorado* (206 U. S., 85), referring to the appropriators within a state:

> "If the case against Colorado fails, it fails also against them."

And such claims fall within the observation previously made by him (p. 83):

"The creature cannot rule the Creator."

Until the rights between the two states as such are settled upon this stream common to both, the title of the State of Colorado to the waters of this stream is not open to question by a suit brought by a citizen of a foreign state, such as the one at bar, and for all purposes of this case the waters of the stream are those of the State of Colorado as completely as the waters of the Passaic River were the waters of the State of New Jersey.

The decision of the Court of Errors and Appeals of the State of New Jersey in the above noted case, by Mr. Justice Pitney, then a justice of that court, deals more at length with the assertion of a right to protection of the interstate diversion on the grounds of interstate commerce, and suggests extended quotation. The case involved the application of a statute of New Jersey prohibiting the diversion of water from that state and after which the recent prohibitory statute of Colorado was modeled (see Statutes of New Jersey and Colorado, Appendix, Part II). We shall limit ourselves to the quotation of a few of the paragraphs from the extended opinion in *McCarter v. Hudson Co. Water Co.*, 70 N. J. Eq., 695:

> "The principal constitutional argument is rested upon that clause of the Federal Constitution (Art. I, Sec. 8) which empowers Congress to regulate commerce among the several states. If the water whose transportation is prohibited, including the

> water of the Passaic River, of which the appellant seeks to make merchandise beyond our territorial borders, is the proper subject of interstate commerce, the state, of course, cannot interfere with the proposed traffic.
>
> Such right as the appellant claims—to withdraw the water from the Passaic River and make merchandise of it—is derived by grant from the East Jersey Water Company" (p. 702).

Mr. Justice Pitney then observes that whatever rights the company may have as against the state must rest either upon its chartered powers or upon the status of a riparian owner, or upon both combined, and concludes that it has no right upon either of those grounds. *Geer v. Connecticut* is considered conclusive. The discussion of that case Mr. Justice Pitney concludes by saying (p. 712):

> "Water, the liquid, in its natural state, is as fugitive in character as game, and as little susceptible to private ownership."

It having been urged that the State of New Jersey had authorized the general merchandising of the waters of the stream, Mr. Justice Pitney concluded:

> "Conceding all that may reasonably be claimed to be the effect of these various enactments, and others of like character, they do not evince any legislative policy to make the waters of our lakes and streams the subject of general merchandise, nor indeed of

merchandise at all in any proper sense. The water that is diverted from a stream into an artificial canal for navigation does not become the subject of commerce. Water that is withdrawn for power purposes returns shortly to the natural bed. That which is withdrawn for the supply of municipalities shortly re-enters the common stock of the state. In a limited sense it may become for a time personal property, and to a limited extent be made the subject of barter and sale, but only for public purposes pertaining to the welfare of our own citizens, who, by the very fact of residence within our borders, have a prior claim upon such natural advantages as pertain to our territory. Any grant of the power of eminent domain is by the Constitution limited to public uses, and the withdrawal of water from a stream in order to make general merchandise of it could hardly be deemed a public use." (70 N. J. Eq., 714).

He further said (p. 716):

"So far from sanctioning any general commerce in water, our legislative policy has been and is to preserve and administer our water rights for the benefit of our own people, to whom, by right of proximity and sovereignty, they naturally belong."

As authority for the decision that the people of New York asserted the right to derive an artificial wa-

ter supply from the territory of New Jersey, without the consent of the people of that state, and that one state cannot expropriate for its public purposes property within the territory of another state, he quoted from Mr. Randolph as follows:

> "'I think it is clear that the right of an individual or a corporation to divert water, whether gained by public grant or by prior appropriation, is presumed to be utilized within the state, which may forbid the carriage of the water beyond its bounds.'" (70 N. J. Eq., 717.)

The New Jersey Act was approved and declared not to be in violation of the interstate commerce clause of the Constitution in the following language (p. 719):

> "The act of 1905 forbids its abstraction by canals or conduits for transportation beyond the state. This is not in violation of the interstate commerce clause of the Federal Constitution, because until the water is lawfully abstracted it does not become the subject of legitimate commerce. *Ames v. Kirby*, 71 N. J. Law (42 Vr.), 442. The state having power to prohibit the diversion of the water from the lakes and streams for transportation beyond the state, the prohibition is a condition imposed upon its diversion, and so the water diverted cannot legitimately enter into interstate commerce. *Geer v. Connecticut*, 161 U. S., 519, 530.

> The act of 1905 is thus vindicated as a legitimate exercise of the sovereignty of this state, not interfering with private property rights, with the rights of citizens of the other states, nor with interstate commerce." (70 N. J. Eq., 719.)

The 1917 statute of Colorado is but another expression of the same prohibition and but an interpretation of the language contained in the Constitution of Colorado (Appendix, Parts I and II).

The Constitution of Colorado in terse but positive terms declares a state or public ownership of the waters of the Colorado streams and reserves and dedicates these waters "to the use of the people of the state." Subsequent to the adoption of the Constitution in 1876 every right to the use of water from any stream in Colorado vested under the prohibition contained in the Constitution and the dedication "to the use of the people of the state" was read into and constituted a limitation upon that right. When the grantor of complainant initiated his appropriation upon the North Fork of the Republican River he took waters from that stream subject to this limitation, and he gained no vested right to convey the waters away from the state where they could not be put "to the use of the people of the state." Any carriage of the water by its canal to the lands of the neighboring state was *ultra vires*, and gave rise to no right to continue so to do. The prohibition was then and ever since has been a condition imposed upon its diversion, and the water diverted could not and "cannot legitimately enter into interstate commerce."

The language of the Constitution reserving the waters of the state for the use of its people took such waters out of the class of property which may properly enter into interstate commerce, and all diversions which were made were limited to use within the state for the benefit of the people of the state and for the development of its arid lands in order that the state government might be maintained and its institutions protected and improved with the increase of population.

Further discussion of this topic would lead to needless repetition, and we respectfully urge that the waters of the North Fork of the Republican River are not now and never have been, at least since Colorado was admitted to the Union in 1876, the subject of interstate commerce and that the complainant had no rights to the diversion and transportation of such waters for which it could claim protection under the interstate commerce clause of the Constitution.

(c)—No Other Rights Under the Constitution and Laws of the United States Affected.

In the District Court and the Circuit Court of Appeals it was contended by complainant that all rights to the use of water from the streams of the arid region were deraigned directly from the United States and that title to all the unappropriated water in these streams remains in the general government until appropriated.

In other words, complainant asserted, in effect, that all of the waters of the United States from the Atlantic to the Pacific are the property of the United States and that the waters of every non-navigable

stream from Maine to California belong to the government and are not held or controlled by the states. Complainant's assertion has this effect for the fundamental reason that all the states, both old and new, stand upon an equality, the original state retained exclusive sovereign jurisdiction over all non-navigable waters within their boundaries, and every new state upon its admission came into the Union upon an equality with the original states, and has all the powers of sovereignty and jurisdiction which pertained to such original states.

United States vs. Harris, 106 U. S., 629, 635;

Kansas vs. Colorado, 206 U. S., 46, 87;

Coyle vs. Oklahoma, 221 U. S., 559, 567, 573;

Scott vs. Lattig, 227 U. S., 229;

Hawkins vs. Bleakly, 243 U. S., 210, 216.

The theory is also advanced that some different title obtains with the waters of the streams west of the Mississippi than obtains in the original thirteen states, by reason of the method of acquisition of the territory which now constitutes the western half of the United States. The territory included within the Louisiana Purchase (including the stream here involved) is supposed to be still burdened with some theoretical limitation not obtaining in Massachusetts, New Jersey or any of the original states.

It would seem, in view of the many decisions by this court, that such theories require no answer. Substantially the same theory was advanced in the case

of *Kansas vs. Colorado* (206 U. S., 46) and was there analyzed and rejected. Similar arguments have been presented in the other cases above noted and were likewise rejected by this court, and as observed in *Bergman vs. Kearney*, 241 Fed., 884, 892, are "largely academic, and could lead to no profitable or decisive conclusion."

In *Hawkins vs. Bleakly*, 243 U. S., 210, it was urged that the Ordinance of 1787 for the government of the Northwest Territory, as extended by certain acts of Congress, still affected the territory of the State of Iowa, which, like the drainage area of the stream here involved, was a part of the Louisiana Purchase. Mr. Justice Pitney disposed of the argument in the following language (p. 217):

> "This is easily disposed of. The Act of 1838 was no more than a regulation of territory belonging to the United States, subject to repeal like any such regulation; and the act for admitting the state, so far from perpetuating any particular institution previously established, admitted it 'on an equal footing with the original states in all respects whatsoever.' The regulation, although embracing provisions of the ordinance declared to be unalterable unless by common consent, had no further force in Iowa after its admission as a state and the adoption of a State Constitution, than other acts of Congress for the government of the territory. All were superseded by the State Constitution. *Permoli vs. First Municipality*, 3 How., 589, 610; *Coyle vs. Oklahoma*, 221 U. S., 559,

567; *Cincinnati vs. Louisville & Nashville R. R. Co.*, 223 U. S., 390, 401." (243 U. S., 217.)

Mr. Justice Brewer concluded consideration of the argument in support of a claim of inherent power in the United States to still control the streams of the arid region, in the case of *Kansas vs. Colorado*, 206 U. S., 46, 93, as follows:

> "But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters." (Citing cases.)

The theory suggested proceeds somewhat upon the thought that the United States still has some public lands in the western states which are as yet undisposed of. This argument is foreclosed in this case by reason of the fact that all land along the North Fork of the Republican River in Colorado passed to patent and out of the hands of the United States prior to 1889 (R. 18) and prior to the initiation of complainant's right (1890).

All the right, title and interest in and to the use of the waters of the Colorado stream which complainant has or may claim vested under and subject to the Constitution, laws and decisions of the courts of Colorado and subject to the limitations thereby imposed and not subject to some law of the United States. A rule which will not apply to the streams of Massachusetts or New Jersey may not be here invoked, for

so to do would be to declare that Colorado was not admitted upon an equality with the original states.

(4)—The Case Involves an Attempt to Control the Action of the State of Colorado. It Likewise Involves the Political Direction of the Executive Officers of the State of Colorado Contrary to the Laws of the State.

The title of the State of Colorado to its property in the waters of the North Fork of the Republican River is not only involved and the state of Colorado is not only an indispensable party, but it is the real party in interest. The control of its officials by the decree of the District Court is the control of the state.

This is true regardless of any question of title or of any property interest in the ordinary sense, for, apart from any such questions, the suit is, nevertheless, in effect, one against the State of Colorado through its executive officials. The state, and not the officials as individuals, is directed by the decree to do certain acts contrary to its Constitution and laws and without its consent.

The District Court was without jurisdiction to entertain the suit or to enter decree against the state, either directly or indirectly.

The suit was brought against the respondent officials, not as individuals but in their several official capacities:

> "John E. Field, **as State Engineer** of the State of Colorado (respondent Weiland, his successor in office, later substituted);
>
> "Filmore Cogswell, **as Division Engineer** of Irrigation, Division No. 1, of the State of Colorado; and

"Dwight L. Bower, **as Water Commissioner** of District No. 65 of Irrigation Division No. 1 of the State of Colorado."

By the bill of complaint it is alleged that the action:

"Is brought to obtain redress for the deprivation by defendants, **under color of the laws and statutes of the State of Colorado**, of the right and privileges of the complainant, secured to it by the Constitution and laws of the United States," etc.

The decree of the District Court (R., 29) enjoined:

"Respondents John E. Field, **as State Engineer**, Filmore Cogswell, **as Division Engineer** of Irrigation, Division No. 1, of the State of Colorado, and Dwight L. Bower, **as Water Commissioner** of District No. 65 in said irrigation division, **and their successors in office**, and all persons acting by, through or under them and each of them,"

from:

"interfering with the right of complainant to said water as herein adjudged,"

from:

"treating complainant in the distribution of water in said water district and division, otherwise than it would be treated if said

> canal were wholly within the state of Colorado, and all lands irigated therefrom were in said last named state,"

or:

> "in any manner depriving the complainant of the continued beneficial use of and enjoyment of its said vested priority and property rights as herein found and decreed,"

and:

> "as the same were and are recognized, defined and designated by the decree of said District Court sitting in Phillips County in said cause No. 872 **and in said judgment and decree of said State Board of Irrigation, Highways and Drainage of the State of Nebraska.**"

As observed in *Hagood vs. Southern*, 117 U. S., 52, 69:

> "In the present cases the decrees were not only against the defendants in their official capacity, but, that there might be no mistake as to the nature and extent of the duty to be performed, also against their successors in office."

And reference to the Constitution and statutes of Colorado (Appendix, Parts I to IV, incl.) reveals at once that the District Court not only entertained a suit against the executive officials of the state in their official capacity, and that

> "The persons sued are the executive officers of the state, and they are proceeded against in their official capacity" (Louisiana vs. Jumel, 107 U. S., 711, 720);

but also violated the rule:

> "A court cannot substitute its own discretion for that of the executive officers in matters belonging to the proper jurisdiction of the latter" (92 U. S., 541).

The provisions of the Constitution and statutes of Colorado governing ownership, control and distribution of the waters of the state, and defining the powers and duties of the official defendants are set forth at length in the **Appendix**, Parts I to IV, inclusive, and are made a part hereof by reference to avoid undue repetition.

The constitutional provisions have already been quoted in this brief. By the terms thereof the water of every natural stream within the State of Colorado is "declared to be the property of the public, and the same is dedicated to the use of the people of the state" (Appendix, Part I, Sec. 2).

The prohibitory statute, further defining the limitations upon the consumers of water diverted from the Colorado streams, and forbidding the carriage and distribution of any of the waters of the state to lands in other states is set forth in Part II of the Appendix, and the legislative acts appropriating public funds for the defense of the waters of the state and specifically reserving all control over such waters in certain legislation for co-operation

with the United States, are set forth in Appendix, Part III.

The Revised Statutes of Colorado, 1908, defining the duties of the state water officials, and bearing upon the adjudication of priorities and the general administration of the waters of the state are set forth in Appendix, Part IV.

The references herein appearing are to the numbers of the sections as the same appear in the Appendix:

The state engineer is given "general supervising control over the public waters of the state" (3322). He has general charge over the work of the division engineers and water commissioners (3324). He acts as consulting engineer for the state during the construction of every reservoir, and has the discretion to require the material used and the work of construction to be done to his satisfaction (3205). He annually investigates, and determines from the conditions as he finds them, the amount of water which, in his discretion, it is safe to impound within the several reservoirs within the state (3207). If he determines that any reservoir is impounding water to more than its safe capacity, the water commissioner, under his orders, withdraws the excess amount down to the safe capacity as determined by the state engineer (3208). He entertains complaints charging danger by threatened destruction of reservoir embankments and, upon examination, withdraws such amount of water as, in his discretion, he deems requisite, and is empowered to use force in the performance of such duties (3209-3210). The owner of any reservoir refusing to obey the directions of the state engineer is subject to fine (3214). He supervises all

exchanges of the water from one stream to another, and determines the deduction therefrom for seepage and evaporation (3222-3223). He is required to perform all additional duties imposed upon him by law and to give his counsel and services, upon the call of the governor (3325). He makes a full and true report of his work to the governor of the state (3331). He acts in a *quasi* judicial capacity on appeals from the orders or regulations of the division engineers and determines the same upon testimony (3344).

The Division Engineers (formerly superintendents of irrigation) are appointed by the Governor and, under the direction of the State Engineer, execute the laws of the state relative to the distribution of water within the state, in accordance with the priorities of appropriation as established by judicial decrees of the Colorado courts in statutory adjudications. The Division Engineer has general control over the Water Commissioners of the several districts within his division (3344). He has discretionary authority to make regulations, in addition to the provisions of the state law, to secure the equal and fair distribution of water in his division (3344). Appeal may be taken from his regulations or any of his rules to the State Engineer (3344). He has the right to call out any Water Commissioner within his division at any time he may deem it necessary and may perform the duties of Water Commissioners (3344). His office and his records are public (3344, 3346). He exercises *quasi* judicial powers in the trial of charges against Water Commissioners (3345). All Water Commissioners are required to report to him (3348, 3350), and he, in

turn, is under the direct control and supervision of the State Engineer, who is authorized to hear and determine charges preferred against Division Engineers (3345).

The Water Commissioners are appointed by the Governor (3427) and have the detailed work of regulating the diversion of water from the streams, opening and shutting headgates, and other like duties (3432). A Water Commissioner is invested with the powers of constable and may arrest any person violating his orders entered in the discharge of his duty (3433). He has general supervising and directing authority, under the Division Engineer and State Engineer, of the streams within his district and is "to guard the public streams in his water district" (3431). He reports to the Division Engineer, as well as to the State Engineer, and the former has jurisdiction to hear all charges against him (3345). He must inspect ditches, and all decrees are subject to his discretionary power of closing down headgates where diversions are made without need for the use of the water or where the same is wasted (3438).

The rights of all persons diverting the public waters of the State of Colorado are determined by the state district courts under special proceedings (3276-3318). The district courts have exclusive jurisdiction for "hearing, adjudicating and settling all questions" concerning all diversions "**and all other questions of law and questions of right growing out of or in any way involved or connected therewith**" (3376). The certified copies of the decrees of the court and the statutes of the state, constitute the authority of the Water Commissioners for regulating the flow of the

water into each canal (3285) and the Water Commissioner is forbidden to recognize any claim of right to divert other than that fixed by the court's decree (3317). All ditches drawing water from the same or its tributaries within the same water district are within the jurisdiction of the court (3276), and the court has jurisdiction to determine all matters "touching any point involved in the matter in question" (3298). Reargument and review of any decree may be made within two years (3318) and any suit affecting the title may be brought within four years (3313). Appeals lie from the decrees of the District Court to the Supreme Court (3307-3312).

We have heretofore noted that, by the decisions of the courts of the state construing the Constitution and statutes, the waters of the state are declared to belong to the state and that the state reserves all right to the distribution and control of the waters within its borders, free from interference by any other sovereignty.

Wheeler vs. Irrigation Co., 10 Colo. 582, 587;

Ft. Morgan Land & Canal Co. vs. South Platte Ditch Co., 18 Colo. 1, 2;

Lamson vs. Vailes, 27 Colo., 201;

Stockman vs. Leddy, 55 Colo. 24, 27.

As tersely stated by Mr. Justice Campbell, in the last case above cited (p. 29):

> "We therefore find it to be not only that our State Constitution and pertinent statutes, but the decisions of the courts and duly

> announced public policy, all are in accord on the proposition to which the Federal Government has, as we have just shown, given its consent that the waters of the natural streams of this state belong to the people, to the state, in its sovereign capacity, and that its right to their distribution and control within its borders is free from any interference by any other sovereignty."

The above decision was announced prior to the adoption of the prohibitory statute of 1911 (Appendix, Part II), and the late statute merely confirms what has always been the rule in Colorado since the adoption of the Constitution.

The courts of the state have full jurisdiction over the adjudication and confirmation of rights to divert and use the waters of streams of the state and their decrees are binding upon all parties to the proceeding. Such a decree, from which no appeal or writ of error is taken, is conclusive.

> *Farmers' Union D. Co. vs. Rio Grande C. Co.*, 37 Colo., 512, 515;
>
> *O'Neill vs. Northern Colorado Irr. Co.*, 56 Colo., 545; 242 U. S., 20.

The official respondents are executive officials of the state, exercising discretionary and *quasi* judicial powers.

In *Ind. Ditch Co. vs. Agricultural Ditch Co.*, 22 Colo., 513, 526, Chief Justice Hayt thus defines the character of superintendents of irrigation (now termed division engineers):

> "The power conferred is executive."

In the case at bar complainant alleges in the bill of complaint that it and its predecessor were parties to the adjudication proceedings had before the State District Court in Phillips County, Colorado. That court entered a decree which limited their right to the diversion of water for the irrigation of only those lands in Colorado, insofar as their diversion conflicted with the diversion and use of the Colorado stream by other and junior appropriators in that state (R., 3). This decree, as above noted, is conclusive upon both the parties and the subject matter, unless reviewed by the Supreme Court of the state within two years after its entry. (*O'Neill vs. Northern Colo. Irr. Co.*, 56 Colo., 545; 242 U. S., 20), as stated by Justice Garrigues in the case cited:

> "The proceeding as to all the parties is *res judicata* and cannot be collaterally attacked" (p. 557).

Even if the decree of the District Court of Phillips County had not specifically limited the rights of complainant's canal to the irrigation of lands in the state, that limitation would have nevertheless been read into the decree as the law of the state, declared by the Constitution and statutes. The United States District Court, notwithstanding the Constitution, laws and decisions of the courts of Colorado, entertained the suit over objection to its jurisdiction, and not only collaterally attacked the decree of the District Court of Phillips County, but as well set aside the Constitution and laws of Colorado and compelled the respondent executive officials to disobey the law of the state and to violate their oaths and duties as

such officers. This was done in the face of the fact that neither the Constitution nor the laws of the state were charged to be in conflict with the Constitution of the United States, and it is to be particularly noted that no act or omission on the part of the officials is charged to have interfered with the full exercise of complainant's rights for the diversion and irrigation of all of its lands under the canal in Colorado, but merely that such acts or omissions had affected its alleged right to divert water into Nebraska.

The substance of the whole matter is that the policy of the State of Colorado, as well as its action, is directed to the proposition that there shall be no recognition of any claims save those of consumers of water within the state and that the water officials shall distribute the water within the state upon this theory and no other. The suit at bar is therefore a direct attempt to annul the constitutional law and the legislation of the State of Colorado and to control the action of the executive officers of the state by substituting the court's discretion for that of the executive officers in matters belonging to the proper jurisdiction of the latter, and substituting its own will for that of the Constitution and laws of the state, notwithstanding the immunity from such a suit guaranteed by the Eleventh Amendment to the Constitution. It would seem obvious that the suit is, in effect, one against the state itself.

The cases in which this court has permitted actions to be maintained against public officers, as not involving the state, are those in which the public officers were acting under an unconstitutional statute or where a public officer declined to perform some plain

official duty requiring no act of discretion. These distinctions are pointed out in the case of *Hagood vs. Southern*, 117 U. S., at page 69. They have no application to the case at bar. In the present case the defendant officers are not violating the Constitution or the statutes of Colorado, but, upon the contrary, they are complying with them. They are not justifying under any Colorado statute or Constitutional provision which is in violation of the Federal Constitution; upon the contrary, they are acting under state enactments, which are the valid acts of a sovereign state and not in conflict with the Federal Constitution (*Kans. vs. Colo.*, 206 U. S., 46; *Stockman vs. Leddy*, 55 Colo., 24).

In the *Hagood* case the court called attention to the fact that a broad line of demarcation separates the cases in which an attempt is made to control the action of a state through its officers from those in which suits are maintained against defendants who, while claiming to act as officers of the state, are proceeding under unconstitutional color of authority, the court saying that in the former class the state, though not nominally a party to the record, is the real party in interest, and that the officers have no personal interest in the subject-matter of the suit, but defend only as representing the state.

In *Louisiana vs. Texas*, 176 U. S., 1, 19, a controversy arose over certain health regulations. This court said that the mere lack of pecuniary interest was not a test of the state's interest, and quoted from *Debs, Petitioner*, 158 U. S., 564, as follows:

> "While it is not the province of the government to interfere in any mere matter of

> private controversy between individuals or to use its great power to enforce the rights of one against another, yet whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are entrusted to the care of the government, and concerning which the government has a duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or prevent it from taking measures therein to fully discharge those constitutional duties."

In *Hagood vs. Southern*, 117 U. S., 52, 68, the court quoted with approval from *Louisiana vs. Jumel*, 107 U. S., 711, 721, to the effect that where a state cannot be sued by reason of the immunity afforded by the Eleventh Amendment to the Constitution, the court has no jurisdiction over its officers so as to control their political power, approving the following:

> "The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the state whose creatures they are and to whom they are ultimately responsible in law for what they do" (117 U. S., 68).

It was accordingly held that the state was the real party in interest and an indispensable party to

the suit and that the court could not proceed to determine the controversy without its presence. It was added that the suggestion that the state had the opportunity and the invitation to appear was immaterial, as it had a right to insist upon its immunity from suit.

The whole tenor of the bill of complaint, in the case at bar, shows conclusively that the bill is directed against the executive officers of the state in their official capacities and that it seeks to control their acts as executing the public policy of the state. This is particularly shown by the fact that the respondents are sued, not as individuals but in their official capacities. The decree entered by the District Court confirms this conclusion and it specifically directs the officers to do and perform certain acts which, in and of themselves, constitute a direct violation of

> "the positive orders of the supreme political power of the state whose creatures they are and to whom they are ultimately responsible in law for what they do" (117 U. S., 68).

This is particularly true in view of the fact that the official respondents were not sued as individuals but as officials, and the prayer of the complaint is directed against their successors in office. The decree of the District Court likewise runs against them as officials and also against their "successors in office" (R., 29). It is clear that such relief would be necessary to put into effect the decree of the District Court, for each new set of officers would be compelled, by their oaths, to enforce the Colorado law and not the law substituted by the court. In this connection the language

of this court in *Hagood vs. Southern*, 117 U. S., 52, 69, is in point:

> "If this case is not within the class of those forbidden by the constitutional guaranty to the states of immunity from suits in Federal tribunals, it is difficult to conceive the frame of one which would be. If the state is named as a defendant, it can only be reached either by mesne or final process through its officers and agents, and a judgment against it could neither be obtained nor enforced, except as the public conduct and government of the ideal political body called a state could be reached and affected through its official representatives. A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the state according to the dictates and decrees of the court, is, if anything can be, a judicial proceeding against the state itself. If not, it may well be asked, what would constitute such a proceeding?
>
> "In the present cases the decrees were not only against the defendants in their official capacity, but, that there might be no mistake as to the nature and extent of the duty to be performed, also against their successors in office."

Mr. Justice Matthews concluded as follows (p. 71):

"The defendants in the present cases, though officers of the state, are not authorized to enter its appearance to the suits and defend for it in its name. The complainants are not entitled to compel its appearance, for the state cannot be sued without its consent. And the court cannot proceed to the determination of a cause and controversy, to which the state is an indispensable party, without its presence. This, however, the Circuit Court has in fact done; and its decrees undertake to dispose of the matter in controversy, and enforce the judgment of the court against the state through its officers, in a suit to which it is not a party. The suggestion that it has had the opportunity and the invitation to appear is immaterial, for it has a constitutional right to insist on its immunity from suit. For these reasons

"The decrees of the Circuit Court are reversed, and the causes are remanded, with instructions to dismiss the bills of complaint" (117 U. S., 52, 71).

In *Louisiana vs. Jumel*, 107 U. S., 711, it was sought, as here, to control the executive officers of the state and to compel them to act contrary to the state law. This court, speaking through Mr. Chief Justice Waite, refused to grant the relief sought and in the opinion said in part as follows:

"The persons sued are the executive officers of the state, and they are proceeded against in their official capacity. * * *

The question, then, is whether the contract can be enforced, notwithstanding the Constitution, by coercing the agents and officers of the state, whose authority has been withdrawn in violation of the contract, without the state itself in its political capacity being a party to the proceedings.

"The relief asked will require the officers against whom the process is issued to act contrary to the positive orders of the supreme political power of the state, whose creatures they are, and to which they are ultimately responsible in law for what they do" (p. 720-721).

"The officers owe duty to the state alone * * *. They can only act as the state directs them to act, and hold as the state allows them to hold. * * * They can be moved through the state, but not the state through them" (p. 723).

"The remedy sought, in order to be complete, would require the court to assume all the executive authority of the state, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the state, as a state, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted

of its jurisdiction and the judiciary set in its place. When a state submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a state cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the state. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power" (107 U. S., 727-728).

Georgia vs. Madrazo, 1 Peters, 110, emphasizes the rule here involved. In the case at bar the executive officials of the State of Colorado and their successors in office are the respondents, and are sued in their official capacities, and not as individuals. the effect is the same as though no individuals were named and the suit had been brought directly against the offices without naming the persons.

In the above cited case, this court, speaking through Chief Justice Marshall, said:

> "The claim upon the governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially.

"The decree is pronounced not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office and the claim made upon him is entirely in his official character, we think the state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made. No person, in his natural capacity, is brought before the court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.

"But were it to be admitted that the governor could be considered as a defendant in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the state, made for the purpose of giving effect to an act of congress; and has done nothing in violation of any law of the United States.

"The decree is not to be considered as made in a case in which the governor was a defendant in his personal character; nor could a decree against him, in that character, be supported" (I Peters, 123).

In the case at bar it could not be contended that a decree could go against the respondent official defendants personally or that any such decree would be of avail. These officials act solely by authority of their office, and the relief was sought and granted by the District Court and affirmed by the Circuit Court of Appeals against their official acts and those of their successors, and the officers and their successors, and not the individuals, were compelled to take the water of the Colorado stream away from its citizens and from the Colorado lands which it serves, and to give such waters to the complainant for the use and benefit of the citizens of Nebraska, and lands in that state, and were thereby coerced by the court into disobeying the law of their state. This is borne out by the fact that the successors in office of the former state engineer prosecutes this appeal.

In the case of *In Re Ayers,* 123 U. S., 443, this court, speaking through Mr. Justice Matthews, discussed at length the distinction between a case such as the one at bar, where executive officials are coerced into a performance of a violation of the laws of their state, and cases where the individuals acting as officers are compelled to act in conformity with the state laws, and held that in such a case as the one at bar the action was, in effect, one against the state, although the state, as such, was not joined as a party, and was, therefore, in contravention of the Eleventh Amendment to the Constitution of the United States. In the opinion it is said:

> "The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a state to the coercive

process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several states of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other states or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents and representatives, where the state, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates" (123 U. S., 505).

In *Pennoyer vs. McConnaughy*, 140 U. S., 1, this court, speaking through Mr. Justice Lamar, again denied the contention that the state could be reached

through a suit for coercion of its officials whereby they were compelled to act contrary to the law of the state:

> "It is well settled that no action can be maintained in any Federal court by the citizens of one of the states against a state, without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision which provides that 'no state shall pass any law impairing the obligation of contracts.' This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. **Accordingly, it is equally well settled that a suit against the officers of a state, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the State itself.**" (p. 9).

Cases such as the one at bar are then distinguished from those suits where officers assume to act under color of an unconstitutional statute or where they act in violation of the law of the state, and the decisions of this court upon the subject are reviewed at length, and it was there held that where the suit is brought against the officers as representatives of the state's action and liability (that is, where the officer sought to be controlled, will be acting for the state in his official capacity), the statute is, in effect, one against the state; but that where the suit is brought against the defendants who claim to act as such offi-

cers, but act under color of an unconstitutional statute, and thereby personally commit trespass (in which case they are not acting for the state), then the suit is not against the state.

An officer who acts under lawful authority cannot be said to be a trespasser, and it cannot be conceived that a personal action for damages could lie against any of the Colorado irrigation officers for the performance of their duties under the mandate of the Colorado Constitution and laws.

In the case at bar the respondent officials are acting under the valid authority of the Constitution and laws of the state, as construed by the highest courts of the state. They are not misconstruing their authority, but are conforming to it. They are acting entirely as officials and not as individuals, and neither the Constitution nor the laws under which they act are attacked as contrary to the Constitution of the United States. Their authority so to act has been recognized by this court as being a valid exercise of the sovereign power of the state in *Kansas vs. Colorado,* 206 U. S., 46. It is the authority of a sovereign state reserved to it under the Constitution of the United States, and the exercise of a power not delegated to the United States, and subject only to such limitations upon its exercise as may be imposed by this court in a proceeding with the State of Nebraska, not its citizens, in an action brought in this court for the purpose of determining the limit, if there be any, upon the exercise of its authority upon the stream in question. If any limitation may be imposed upon this authority, it is not on account of its conflict with any superior law, but on account of the fact

that this court, in its exclusive jurisdiction of disputes between states, may limit the subject matter upon which this authority operates.

In Re Ayers, 123 U. S., 443, it was said that the Eleventh Amendment "should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose" (p. 505), and it was further observed that in the case of *U. S. vs. Lee* (106 U. S., 196), the question turned upon the fact that the defendants had no lawful authority to act for the United States, and that therefore there was nothing to prevent a judgment against them as individuals for their personal trespasses, and the court observed:

> "This feature will be found, on an examination, to characterize every case where persons have been made defendants for acts done or threatened by them as officers of the government, either of the state or the United States, where the objection has been interposed that the state was the real defendant and has been overruled. The action has been sustained only in those instances where the act complained of, considered apart from the official authority alleged as its justification, and as the personal act of the individual defendant, constituted a violation of right for which the plaintiff was entitled to a remedy at law or in equity against the wrongdoer in his individual character." (123 U. S., 501.)

Antoni vs. Greenhow, 107 U. S., 769, and *Stephens vs. Texas Co.*, 100 Tex. 177, 184, are inter-

esting cases on the same subject. The case last mentioned, after referring to the repeated decisions of the Supreme Court prohibiting injunctions against the official acts of the executive officials of the states, says that such an injunction would operate to prevent the action of the only officers who are by law authorized to act for the state, and adds:

> "The right arm of the state is manacled by this writ of injunction, and yet it is said that the body is not a party to the proceeding" (100 Tex., 184).

The above statement is in harmony with the language of this court in *In Re Ayers* (*supra*):

> "If officers, attorneys and agents are persons subject to the process of the court so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?" (123 U. S., 497.)

In the case at bar, the interest of the State of Colorado is not that character of mere naked governmental interest such as every government has in all litigation carried on within its jurisdiction. Upon the contrary, the settled policy of the state from the date of its admission to the Union has been that of reserving the waters of its streams for the use "of the people of the state." The arid lands of the state could only be made to produce by application of the water of the streams and if the state is to endure and prosper and its institutions be maintained, it is

compelled to conserve and utilize to the utmost degree, the natural resource consisting of the waters of its streams. Its history has proven this resource to be its most valuable one and by its use its otherwise arid lands have been brought to such a state of production that its agricultural products exceed in value those of its mines or any of its industries. The department of water distribution of the state is therefore as important as any branch of the state government.

The decree entered by the District Court in the present case, and affirmed by the Circuit Court of Appeals, sets aside this executive department and substitutes the will and decree of the court in lieu of the law of the state as executed by the department, and thereby directs the general and specific conduct of the respondent officials, as state officials, and compels them to act in violation of the Constitution and laws of the state and thus assumes control of the political action of the state itself. If the executive officials refuse to obey the decree of the United States District Court and refuse to disobey the Constitution, laws and decrees of Colorado, the court will thereupon substitute its own executive force and by coercing the executive officials of the state will override the laws of the state and substitute rules of its own in lieu thereof.

In the case of *Louisiana vs. Texas* (176 U. S., 1), jurisdiction was denied on the ground that the State of Texas had not authorized or confirmed the alleged action of its health officer so as to make his action the action of the state and thereby to bring the two states into the controversy. The court said that the mere

mal-administration of the law, or the acts of officers in abuse of their power, could not be laid hold of as committing one state to a controversy with a sister state. The converse is true in the case at bar. Here the acts of the respondent water officials are the acts of the state in the execution of its law and their acts are enjoined upon them by the state itself. The case involves the action of the State of Colorado and no matter by whom the suit may be brought or what defendants are named, the determination of the issues by the decree entered by the District Court involves the action of the state itself.

In *Harkrader vs. Wadley*, 172 U. S., 148, 169, this court, speaking through Mr. Justice Shiras, announced the rule to be as follows:

> "No case can be found where an injunction against a state officer has been upheld where it was conceded that such officer was proceeding under a valid statute."

And quoting from *In Re Ayers* (123 U. S., 443, 497):

> "'If all such officers, attorneys and agents are persons subject to the process of the court so as to forbid their acting on its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?'"

A comparison of the language of Chief Justice Fuller in the cases of *Louisiana vs. Texas*, 176 U. S., 1, 22, and in *Kansas vs. Colorado*, 185 U. S., 125, 142, brings out the line of demarcation. In the former he said:

> "A controversy between states does not arise unless the action complained of is state action, and acts of state officials in abuse or exercise of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state."

With this language clearly in mind, Chief Justice Fuller made it clear in the Kansas-Colorado case that controversies involving the waters of a stream, such as the one at bar, are suits against a state, for he paraphrased the language in the Louisana case and characterized the controversy relative to the conflicting claims to the water of the Arkansas River as follows:

> "The action complained of is state action, and not the action of state officers in abuse or excess of their powers."

The want of jurisdiction in the District Court to entertain a suit such as the one at bar, by reason that the suit is in fact one against the state and is prohibited by the Eleventh Amendment to the Constitution of the United States, as announced in the cases already cited and other like decisions of this court, is thus summarized by Mr. Justice Lamar in *Hopkins vs. Clemson College*, 221 U. S., 636, 642:

> "With the exception named in the Constitution, every state has absolute immunity from suit. Without its consent it cannot be sued in any court, by any person, for any cause of action whatever. And, looking through form to substance, the Eleventh

> Amendment has been held to apply, not only where the state is actually named as a party defendant on the record, but where the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer which seeks to compel him to exercise the state's power of taxation; or to pay out its money in his possession on the state's obligations; or to execute a contract, or to do any affirmative act which affects the state's political or property rights." (221 U. S., 642.)

To the same effect are the decisions of this court in *Murray vs. Wilson Distilling Co.*, 213 U. S., 151, and *Lankford vs. Platte Iron Works Co.*, 235 U. S., 461. The former involved the property of the State of South Carolina in the hands of a State Commission and the commissioners were sued as such officials in the same manner that the property of the State of Colorado is here in the control of the respondent water officials, who were sued as such officials in the District Court. The contention having been made that the suits were "in substance suits against the state, and therefore beyond the jurisdiction of the Circuit Court, because of the express prohibition of the Eleventh Amendment" (p. 167), this court, speaking through Mr. Justice White, decided that such was the case, and reversed the decree of the Circuit Court, with instructions to dismiss the cases. It was said:

> "We could not, therefore, sustain the exercise of jurisdiction by the Circuit Court

> without, in effect, deciding that the state can be compelled by compulsory judicial process to perform a contract obligation. * * * But it is settled that a bill in equity to compel the specific performance of a contract between individuals and a state cannot, against the objection of the state, be maintained in a court of the United States" (p. 168).

In the case at bar, the Circuit Court of Appeals proceed upon the erroneous theory that, conceding the State of Colorado to be the owner of the waters here involved (R., 53), the proceeding was not one against the state and prohibited by the Eleventh Amendment to the Constitution (R., 54), but that the action was one to prevent the state officials from violating the law of the state in refusing to recognize any right in complainant to divert more than 15 cubic feet, the amount of water decreed to its canal for irrigation of its Colorado lands (R., 54). In other words, that the Colorado officials were violating the law of their state when they refused to recognize any right in complainant to divert water in Colorado for the irrigation of Nebraska lands. The error of the court flowed from its misinterpretation of the law of Colorado which prohibited (not permitted) diversions of water in the state for uses in other states and from an inadequate conception of the right of Colorado to use her own resources as she might will, at least until the exercise of her sovereign will should be called into question before this court in a suit between the two states whose territory is involved. The Circuit Court of Appeals further erred in failing to consider the case as a whole (Assignment of Error XXVII), including

the evidence, offer of proof and decree, which evidence and offer of proof showed so conclusively that no law of Colorado had been violated that the District Court withdrew from consideration and by decree dismissed all such issues (R., 20, 25 and 29). The following quotation from the opinion reveals the error of the Circuit Court of Appeals (R., 53):

> "We do not think, however, that it is necessary to decide, in determining the question before us, as to whether the State of Colorado is the owner of all the unappropriated water flowing in the streams of that state, as conceding without deciding that Colorado is the owner of such waters, still we think the present action was not one against the state.
>
> "The plaintiff alleges that it is the owner of a ditch which has diverted a certain number of feet per second of water from the North Fork of the Republican River in Colorado and has used said water in the irrigation of lands in Colorado and Nebraska for more than twenty years without any complaint or hindrance from anyone; that said waters so diverted have been used in the proportion of fifteen feet in Colorado and seventy-seven feet in Nebraska during the time mentioned. It also alleges that the officers of the state, who are made defendants, refuse to allow the plaintiff to divert more than fifteen feet and required said fifteen feet to be used in the State of Colorado.

"The suit is not one to compel the state officers to act in violation of the laws of the State of Colorado or to control the performance of their general duties, but is a suit which seeks to compel said officers to cease violating what is claimed to be the law of Colorado and the rights to which the plaintiff claims it is entitled. In support of the contention of the defendants the recent case of Lankford vs. Platte Iron Works, 235 U. S., 461, is cited. That case, however, is very much different than the case at bar. * * * In this case the plaintiff simply asks that the state officers cease interfering in violation of law with the rights of the plaintiff. * * *

"It is our opinion that the case cannot be said to be one against the State of Colorado within the meaning of the Constitution."

We have already considered the Constitution and statutes of Colorado (Appendix, Parts I to IV incl.) and the construction thereof by the courts of the state. We there observed that not only had the state reserved the waters of the state for "the use of the people of the state" as a part of the act of admission, but that it had consistently since hitherto, both by statutes and the decisions of its courts (*Stockman v. Leddy*, 55 Colo., 24, 27; *Kansas v. Colorado*, 185 U. S., 125; 206 U. S., 46), adhered to the doctrine that the waters of its streams are to be reserved to the use of its people free from claims by citizens of other states, subject only to be called to an accounting of the reasonableness of the exercise of its sovereign powers in a suit brought by a neighboring state

before this court, and not in a suit before a Federal District Court, whose jurisdiction is denied by the Eleventh Amendment to the Constitution and whose judgment would be void if entered, even by common consent of private litigants (*Minnesota v. Hitchcock*, 185 U. S., 373, 382). We have further observed the character of the duties to be performed by the official respondents, and have found that they are executive officers of the state, and that as such "they can be moved through the state, but not the state through them" (107 U. S., 723); that the diversion of water in Colorado for use in Nebraska is prohibited by the laws of the state, and that the respondents' executive officials are acting in violation of the law of the state if they obey the decree of the District Court affirmed by the Circuit Court of Appeals.

The waters of Colorado are reserved to the state for the use of its people. The statutes of the state direct the respondent water officials to distribute, guard and protect this property in conformity with the Constitution and laws of the state and the decisions of its courts. The matter should be considered from the standpoint of state interest, and the suit is one against the state although brought against the officials. The nature of the suit and the property rights involved are not changed by raising the same questions in a suit between an individual and the water officials. The fact remains that the water of the State of Colorado is here involved, and that the suit was brought to compel, and the decree of the District Court, as affirmed by the Circuit Court of Appeals, coerced the water officials of the state to distribute the water of the stream contrary to the Constitution and laws of the State of Colorado and,

by the decree, the state officials were compelled to take the greater part of the water of this Colorado stream and deliver it to citizens of Nebraska for use upon lands in that state, notwithstanding the express prohibition of the laws of the State of Colorado and the decisions of its courts. The action is state action. The suit involves the property of the state, and is a suit against the state, and the suit and the decree entered therein involve the political direction of the executive officers of the State of Colorado contrary to the laws of the state. The action was prohibited by the Eleventh Amendment to the Constitution of the United States and the decree of the District Court was void.

(5)—The State Is the Real Party in Interest. The Suit and the Decree Entered Therein Involve a Limitation of the Sovereign Rights of the State of Colorado.

The suit and the decree entered by the District Court therein and approved by the Circuit Court of Appeals involves a limitation of the sovereign rights of the State of Colorado. Hence the suit is one against the state, and the state is the real party in interest irrespective of the nominal parties to the record.

The right of the State of Colorado to impress its sovereignty upon the waters of the streams of the state and to take full control of its most valuable resource was recognized and approved in the case of *Kansas vs. Colorado,* 185 U. S., 125; 206 U. S., 46, and similar assertions of sovereign right were approved in *Hudson Co. Water Co. vs. McCarter,* 209 U. S., 349; *Georgia vs. Tennessee Copper Co.,* 206 U. S., 230; *Snyder vs. Gold Dredging Co.,* 181 Fed., 62,

and many other cases. That the assertion of such a right and the carrying into effect of the same in no way violates the Constitution was likewise approved by those decisions, subject only to a recognition of the right of a neighboring state to call into question the reasonableness of the exercise of the sovereignty in a suit in this court between the states, and not in a suit in the District Court by citizens of other states.

In the case at bar the only rights which complainant may claim are those which it and its predecessor were permitted to obtain under the Constitution and laws of Colorado. The limitations fixed by the Constitution and laws of Colorado were read into and became a part of whatever title the individual obtained. And all the rights, which the state permitted the private citizen to acquire to the use of the water of the stream, were limited to use within the jurisdiction of the state where the same would be at all times subject to the law and regulation of the state and might, if needed, be taken away by the state, in order to supply new uses and greater necessities of the state and its people. The rights acquired by the appropriator were in the nature of a limited easement to the use of the property of the state, with the title remaining in the state and subject to its sovereign will.

Before complainant may be permitted to divert water out of the state against the sovereign will of Colorado, for use in Nebraska, there must be some adjustment between the States of Nebraska and Colorado, either by interstate agreement with consent of Congress, or by decree of this court in an original suit between the states. The interest of complainant in such a diversion is but incidental as compared with

the interest of Nebraska upon whose territory the waters, so diverted against the will of Colorado, are to be applied and who will in the end reap the greater benefit.

The decree of the District Court, affirmed by the Circuit Court of Appeals, brings about the same result as though it had been entered by this court in a suit between the States of Colorado and Nebraska. If permitted to stand, the natural resource and property of Colorado is taken away against its will and over its objection (as expressed by its laws) and perpetually given to Nebraska and its citizens. Colorado is deprived of the benefits of the greater portion of the waters of its stream and its territory is compelled, by judicial process, to remain arid, in order that the lands of Nebraska and its citizens may be served and reclaimed.

But, notwithstanding this direct effect of the decrees of the District Court and the Circuit Court of Appeals, these decrees were entered in a case where the State of Colorado, the real party in interest, was not before or within the jurisdiction of the court, and in a case in which the rights so involved could not be adjudicated by reason of the prohibition of the Eleventh Amendment to the Constitution. The State of Colorado was the real party in interest and the District Court was without jurisdiction to entertain the suit or to enter its decree.

Louisiana vs. Jumel, 107 U. S., 711, 722, 727;

Cunningham vs. Macon & Brunswick R. R. Co., 109 U. S., 446, 451, 457;

Hagood vs. Southern, 117 U. S., 52, 67, 69;

In Re Ayers, 123 U. S., 443, 487, 488, 489, 492, 497;

Pennoyer vs. McConnaughy, 140 U. S., 1, 9, 12;

Harkrader vs. Wadley, 172 U. S., 148, 169;

Minnesota vs. Hitchcock, 185 U. S., 373, 387;

Hopkins vs. Clemson College, 221 U. S., 636, 642;

Lankford vs. Platte Iron Works Co., 235 U. S., 461.

(6)—The State of Colorado Was an Indispensable Party.

Regardless of the question whether the action is one against the State of Colorado, it is still true that if the state was an indispensable party the District Court had no jurisdiction. This would be true even if the official respondents had not been made parties, and the nominal respondents were the individual consumers of water in Colorado. While there is a class of parties who ordinarily should be joined as parties to a suit, but may be dispensed with if to join them would defeat the jurisdiction, on the other hand, there are indispensable parties without whom the court cannot proceed. These are parties who not only have an interest in the suit, but such an interest that a final decree cannot be made without affecting their interest or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience. A court will not exercise jurisdiction in a case where it cannot do justice without the presence of other

parties and where a judgment it might enter between the parties to the record would so involve the rights of persons not parties to the record that the remedy would not be complete (*Shields vs. Barrow*, 17 How., 130).

In *Cunningham vs. Macon & Brunswick R. R. Co.*, 109 U. S., 446, this court, speaking through Mr. Justice Miller, said:

> "It may be accepted as a point of departure unquestioned that neither a state nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a state may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.
>
> "This principle is conceded in all the cases, and whenever it can be clearly seen that the state is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction" (p. 451).

And concluded a review of the cases as follows:

> "Courts of equity proceed upon different principles in regard to parties. As was said in *Barney v. Baltimore*, 6 Wall., 280, there are persons who are merely formal parties without real interest, and there are those who have an interest in the suit, but which will not be injured by the relief sought

and there are those whose interest in the subject-matter of the suit renders them indispensable as parties to it. Of this latter class the court said, in *Shields v. Barrow*, 17 How., 130, 'they are persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without affecting that interest or leaving the controversy in such a condition that its final disposition may be wholly inconsistent with equity and good conscience.'

"'In such cases,' says the court in *Barney v. Baltimore*, 6 Wall., 280, 'the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction.'

"In the case now under consideration the state of Georgia is an indispensable party. It is in fact the only proper defendant in the case. No one sued has any personal interest in the matter or any official authority to grant the relief asked" (109 U. S., 456).

In *Hagood vs. Southern*, 117 U. S., 52, a case in many features similar to the case at bar, the court, speaking through Mr. Justice Matthews, said that although the state was not in name a party to the action, it was, nevertheless, the actual party, and that the suit could not be brought against the state officials when in effect the suit was one against the state. He concluded by saying:

> "The defendants in the present case, though officers of the state, are not authorized to enter its appearance to the suits and defend for it in its name. The complainants are not entitled to compel its appearance, for the state cannot be sued without its consent. And the court cannot proceed to the determination of a cause and controversy, to which the state is an indispensable party, without its presence. This, however, the Circuit Court has in fact done; and its decrees undertake to dispose of the matter in controversy, and enforce the judgment of the court against the state through its officers, in a suit to which it is not a party. The suggestion that it has had the opportnuity and the invitation to appear is immaterial, for it has a constitutional right to insist on its immunity from suit" (117 U. S., 71).

In the case of *In Re Ayers*, 123 U. S., 443, the court, speaking through Mr. Justice Matthews, decided that the state, although not nominally a defendant, was, nevertheless, an indispensable party, and concluded its discussion of the case of Osborn vs. Bank of United States, 9 Wheat., 738, in the following language:

> "This conveys the intimation that where the defendants, who are sued as officers of a state, have not a real but merely a nominal interest in the controversy, the state appearing to be the real defendant, and, therefore, an indispensable party, if the jurisdiction

does not fail for want of power over the parties, it does fail as to the nominal defendants for want of suitable subject-matter" (123 U. S., 488).

In *Belknap vs. Schild*, 161 U. S., 11, an injunction was sought to restrain the defendant from using certain gates in connection with works belonging to the United States. He answered that he used them as the property of the United States. The court held:

> "But no injunction can be issued against officers of a state, to restrain or control the use of property already in the possession of the state, * * * or to compel the state to perform its obligations; or where the state has otherwise such an interest in the object of the suit as to be a necessary party."

The *Belknap* case was approved by this court in *International Postal Supply Co. vs. Bruce*, 194 U. S., 601, and there the court, speaking through Mr. Justice Holmes, after observing that the United States had a property in the machines involved, although less extensive than absolute ownership, observed that if an injunction was issued against the officers of the government it would practically work "a prohibition against its use by the United States" and said:

> "This right cannot be interfered with behind its back, and as it cannot be made a party, this suit, like that of *Belknap vs. Schild*, must fail" (194 U. S., 606).

In *Minnesota vs. Hitchcock*, 185 U. S., 373, 387, this court, speaking through Mr. Justice Brewer, observed:

> "If whether a suit is one against a state is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered."

In *Hopkins vs. Clemson College*, 221 U. S., 636, Mr. Justice Lamar thus stated the rule:

> "With the exception named in the Constitution, every state has absolute immunity from suit. Without its consent it cannot be sued in any court, by any person, for any cause of action whatever. And, looking through form to substance, the Eleventh Amendment has been held to apply, not only where the state is actually named as a party defendant on the record, but where the proceeding, though nominally against an officer, is really against the state, or is one to which it is an indispensable party" (221 U. S., 642).

Without further quotation from the cases, we observe that the following decisions of this court uphold the general doctrine that in cases, such as the

one at bar, a state, though nominally not a party to the suit, is, nevertheless, the real party in interest and an indispensable party and that the suit is prohibited by the Eleventh Amendment to the Constitution.

Stanley vs. Schwalby, 162 U. S., 255, 271;
Murray vs. Wilson Distilling Co., 213 U. S., 151, 168;
Lankford vs. Platte Iron Works Co., 235 U. S., 461;
New Mexico vs. Lane, 243 U. S., 52, 58.

The extent of the interest of the state, its standing in court to protect its property and the health and general welfare of its inhabitants (and therefore an indispensable party) is recognized by this court in the following cases:

Missouri vs. Illinois, 180 U. S., 208; 200 U. S., 496;
Georgia vs. Tennessee Copper Co., 206 U. S., 220;
Kansas vs. Colorado, 185 U. S., 125; 206 U. S., 46;
Hudson Co. Water Co. vs. McCarter, 209 U. S., 349.

As we have previously observed, the decree entered by the District Court and affirmed by the Circuit Court of Appeals left the controversy in such a condition that its disposition was wholly inconsistent with equity. It in effect annulled the laws of Colorado and compelled the executive officials of that

state to act in defiance of the Constitution and laws of the state. It compelled these officers to violate their oaths and duties as such and in lieu of the law of their state to substitute the rule of a District Court. The decree of the state District Court, of Phillips County, Colo., was in effect set aside and held for naught. Junior appropriators in Colorado, who, by the decree of the state court, were adjudged to be entitled to use the waters of the stream after complainant had been supplied with 15 cubic feet per second for use on its Colorado lands, were enjoined by the District Court from asserting the right given them by the laws of their state and the decree of the state court. If the officers of the state follow the law of the state in the control of the waters of the stream they are acting in contempt of the decree of the District Court, while if they follow the decree of the District Court they violate the law of the state and are subject to impeachment and fine for so doing.

The water of the stream, a part of Colorado's most valuable resource, is taken away and given to Nebraska, without consent and over the objection of Colorado, as expressed by its laws, and this is accomplished as completely and effectually by the decree of the District Court as though that decree had been entered by this court in an original proceeding between the states. The State of Colorado was not a nominal party to the suit and did not appear or defend, but, through its officers, insisted upon its immunity from suit. If the State of Colorado was not an indispensable party in this character of a suit it is difficult to conceive of a case in which it might be so interested as to become an indispensable party. We urge that such was the case and that the decree

of the District Court was prohibited by the Eleventh Amendment to the Constitution.

(7)—The Suit Would Remain One Against the State if the Official Respondents Had Been Dismissed.

The interest of the State of Colorado in the subject matter involved in the suit and decree of the District Court, was of such a nature, and the effect upon the property interests of the state was such, that the suit would have been one against the State of Colorado, and prohibited by the Eleventh Amendment to the Constitution, even though the official respondents had not been joined as nominal parties or if they had been dismissed as respondents by the District Court.

A further statement of the interests and property rights of the State of Colorado would lead to needless repetition. These rights have been repeatedly considered and discussed in the foregoing pages. The effect of the decree is manifest. The waters of the Colorado stream are taken away in a suit prohibited by the Eleventh Amendment to the Constitution and are given to a neighboring state in perpetuity. The territory of Colorado is impressed with a foreign servitude against its will and its inhabitants are made to suffer so that a neighboring state and its citizens may be made to prosper. In fact, the suit involves a determination of the state's interest and action and the question whether the suit was one against the state, is just as prominent in a case in which individuals are the defendants as it is in a case where the same relief is sought against the individuals and the executive officers of the state. Whether offi-

cials or individuals are defendants, the fact remains that they all justify under the Constitution and laws of the State of Colorado and that the acts complained of are the combined acts of the state and its citizens.

If the decree, which was entered, did not have the effect of laying hold of a certain quantity of the water of the Colorado stream and taking it from the state and the control of its water officials, it was nugatory and its entry was a futile act. Courts do not enter such decrees. The intent of the court was that it should have the effect of taking the water from the Colorado stream and of denying Colorado and its citizens the benefit of its use. This being true, the suit was one against the state, whoever might be named as nominal defendants. No matter who the parties may be, it is still the law, as declared in *Cunningham vs. Macon & Brunswick R. R. Co.*, 109 U. S., 446, 451, that

> "whenever it can be clearly seen that the state is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought, it will refuse to take jurisdiction."

Irrespective of the effect of the enforcement of the decree, the fact remains that the suit involved a determination of the rights of the State of Colorado and the decree amounted to an annulment of its laws and of its political and sovereign action, and whatever view may be taken of the controversy, it is certain that it was, in effect, one against the state, and as such was prohibited by the Constitution.

(8)—Conclusion.

In conclusion of this section of the brief, we respectfully urge that the District Court had no jurisdiction to entertain the suit or to enter decree therein, and that the Circuit Court of Appeals committed error in affirming the decree of the District Court, for the reasons that the suit involved the title of the state to the water of the North Fork of the Republican River; that it gave extra-territorial effect to a void decree of a Nebraska tribunal and expropriated the property and natural resources of Colorado, without its consent, for the benefit of Nebraska and its citizens, and imposed upon the territory of Colorado a foreign servitude without its consent; that no rights or privileges secured to complainant by the Constitution and laws of the United States were involved; that the suit was a collateral attack upon a conclusive decree of a state court having jurisdiction of the person and the subject matter here involved; that the case involved an attempt to control the action of the State of Colorado and the political direction of its executive officers of the state, contrary to the laws of the state; that the suit and decree entered therein involve a limitation of the sovereign rights of the State of Colorado; that the state was the real party in interest and was an indispensable party and that the suit was one against the State of Colorado and was prohibited by the Eleventh Amendment to the Constitution.

II.

Riparian Rights of Colorado Landowners and Equitable Apportionment of the Waters of the Stream.

Assignments of Error IX to XXVII, Inclusive, refer to the same general subject and will be considered together in this subdivision of the brief.

Respondents by their answer alleged, as a separate defense, that, in a suit in equity involving the waters of an interstate stream, the laws of both states must be taken into consideration; that by the laws of Nebraska riparian rights were recognized prior to 1889; that all the lands riparian to the North Fork of the Republican River in Colorado had gone to patent prior to 1889, and as against Nebraska lands, were entitled to an equitable distribution of the waters of the stream regardless of the time of diversion and application thereof; that all of respondents' ditches were used to irrigate riparian lands in Colorado which had gone to patent prior to 1889, and that said lands, if in Nebraska, would be entitled to a preferred use of the waters of the stream as against the claims of complainant for its canal, initiated in 1890; that the use of the water by the Colorado ditches upon such riparian lands was economical and without waste, and that the flow of the stream was not greatly diminished by such diversion and application, and that after such use the greater part of the waters of the stream in Colorado would flow down into Nebraska for the use of riparian lands in that state, were it not for the diversion of complainant's canal; that only a fair and just proportion of the waters of the stream are con-

sumed and exhausted in Colorado, wholly upon riparian lands, and that in equity and good conscience the right to use such water should not be interfered with (R., 11).

Respondents further separately answered that the North Fork of the Republican River has its rise in Colorado: that the waters used by respondents' ditches are applied upon lands riparian to the stream and in a narrow valley in Colorado; that the greater part of the water returns to the stream and thereafter flows down the same for use in Nebraska, and that all of the ditches in Colorado taken together do not consume more than an equitable part of the waters of the interstate stream.

In other words, respondents contended that, inasmuch as the court had assumed jurisdiction of the case, it should so consider all the parties and adjudicate all the rights involved as to do equity between all of the parties and between the water users in both states; that while the respondents did not concede that the court had jurisdiction, nevertheless, in that it had assumed jurisdiction, it should apply the rules announced by this court in the case of *Kansas vs. Colorado* (185 U. S., 125; 206 U. S., 46) for a proper determination of the rights and interests of all parties upon the entire stream.

Proof of the facts necessary to enable the District Court to arrive at a just and equitable consideration and adjudication of the rights of all interested parties in both states and particularly the riparian land owners and respondent water users in Colorado was introduced by respondents (R., 15-20) or offer to make proof submitted (R., 21-23). All proof so made

or offered was, nevertheless, ruled out of the case by the court (R., 23) and the court assumed, notwithstanding the conflict of the laws of Colorado and Nebraska, to consider the case as though the Nebraska lands were governed by the laws of Colorado, and ignored that all such matters were *res judicata* by the decree of a state court of Colorado (R., 23-25).

While we again respectfully urge that the suit was one against the State of Colorado and was prohibited by the Eleventh Amendment to the Constitution of the United States, we shall, nevertheless, give brief consideration to the two contentions above noted:

(1)—Riparian Rights of Colorado Landowners.

The contention of the respondents, as above noted, was that all lands riparian to the interstate stream in both states should receive equal protection. By the suit filed in the District Court and the decree therein entered the Colorado-Nebraska state line was, in effect, moved to the east so as to place the lands in Nebraska, served by the canal, in the same position as though they were all situated in Colorado (but not under the control of or bound by the decrees of the state courts or the Constitution and laws of the state). The language of the court was that the complainant in the distribution of water should not be treated:

> "Otherwise than it would be treated if said canal were wholly within the State of Colorado, and all the lands irrigated therefrom were in said last named state" (R., 29).

Respondents asserted that if the District Court had jurisdiction to thus, in effect, move the Colorado-Nebraska line easterly, in order to do equity between the parties, it should likewise, in effect, move that line westerly so as to accord the Colorado land owners the benefit of the same rights and privileges that obtained in Nebraska for similar lands riparian to the same stream.

All forty-acre tracts riparian to the Republican River in Nebraska, which went to patent prior to 1889, have a perpetual riparian right to the use of the water of that stream superior to any appropriations thereafter made and irrespective of the fact that no beneficial use had been made of the water of the stream by such riparian lands prior to the construction of canals and beneficial application of the waters of the stream thereby. The Supreme Court of Nebraska has held that the common law of riparian rights obtained in that state prior to the Statute of 1889 (Appendix, Part V); and that such rights still obtain with all riparian forty-acre tracts which went to patent prior to that date.

Crawford Co. vs. Hathaway, 67 Neb., 325.

The character of riparian rights and the limitations placed upon the use of the water by the riparian owners are familiar to this court and have been considered in many cases. (See Wiel on Water Rights, 3rd ed., Vol. I, p. 154, sec. 126; p. 812, sec. 748; and p. 914, sec. 861.)

All forty-acre tracts along the North Fork of the Republican River in Colorado which had gone to patent prior to 1889 would be entitled to the common law

right of riparian use of the water of the stream if such lands were located in Nebraska. On the other hand, all lands in Nebraska riparian to this stream would not be entitled to the common law riparian right to the use of the water if the same were situate in Colorado, by reason of the fact that no such rights have ever been recognized in that state. If all the Nebraska lands were situate in Colorado the only benefit they would obtain from the waters of the North Fork of the Republican River would be such as they could obtain by use of the water of the stream under the rule of priority of appropriation, limited in the application to streams within the state, while if the Colorado lands were situate in Nebraska the canals for the irrigation of non-riparian lands would be limited in their supply to such waters as remained in the stream after supplying the common law uses of the riparian lands and the appropriator, for non-riparian lands, would only be permitted to take such part of the water of the stream as might be available after satisfying riparian land owners.

In the case at bar, the Nebraska corporation, for the purpose of irrigating Nebraska lands, sought an injunction against the users of water in Colorado. It based its claim not upon rights obtained under the Nebraska law, because the Nebraska law of riparian rights would require that the claims of riparian owners be respected before the water could be diverted by the canal. Under the Nebraska law the complainant would have been compelled to compensate the upper riparian land owners before it could have claimed any right to the water in preference to uses upon the riparian lands. The suit was not based upon Colorado law because the law of that state, while refusing to

recognize riparian rights, nevertheless denies any right in complainant to divert the water of its streams for use outside its borders and the waters of the streams of the state are set aside and dedicated "to the use of the people of the state" and not to the use of people of other states. (See Colo. Const., Appendix, Part I; *Stockman vs. Leddy,* 55 Colo., 24; S. L. Colo. 1917, Appendix, Part II.)

It was asserted in the District Court and Circuit Court of Appeals that the complainant had certain rights by virtue of the Act of Congress of 1866, recognizing local laws, customs and decisions of the courts. But the apparent question is—under what local laws, customs and decisions of what courts? Is the right claimed under those of Nebraska or those of Colorado? If the right is claimed under the local law of Nebraska then it would appear that the doctrine of riparian rights and the reasonable and economic use of the waters of the stream by the riparian proprietors was a matter for first consideration in the case. If the claim is made under the Colorado laws, customs and decisions of the courts, the answer is that there are no local laws, customs and decisions of the courts of Colorado that recognize any right to divert from any natural stream within the state for use upon lands without the state and, on the contrary, that the Constitution, laws and decisions of the courts of Colorado reserve the waters of the streams of the state to the use of the people of the state and forbid its use upon lands in other states.

It would seem that respondents would be as much entitled to invoke the protection of the riparian laws of Nebraska, in their right to the use of the waters of

the stream upon their riparian lands, as would the lands of Nebraska have a right, through complainant, to invoke a part only of the Colorado law for the benefit of Nebraska lands, and that the Colorado users would be in the better position by reason of the fact that the laws of Colorado specifically prohibit any such interstate diversion.

But if it be true, which we respectfully urge is not the fact, that state lines in no manner affect the rights of persons using water for irrigation, then it would follow that the laws of both states must be given extra-territorial effect and the land owners in one state should not be granted any more benefit of the waters of the stream than are the land owners in the neighboring state. To be sure, to assert that the laws of Nebraska can reach over into and have extra-territorial effect upon lands in Colorado or that the laws of Colorado can affect rights and property in Nebraska is to refute the assertion (*Kansas vs. Colorado,* 206 U. S., 46, 95). If it be stated, on the other hand, that the laws of neither state control the use of the waters within their borders, but that some superior law governs this use irrespective of state lines, the statement is its own denial, for such would be, in effect, but an assertion that none of the newer states of the Union were admitted upon an equality with the original states and that the original states had and retained greater powers than had any of the states admitted to the Union after the adoption of the Constitution (*Kansas vs. Colorado,* 206 U. S., 46).

But if, nevertheless, by some line of reasoning it should be decided that the District Courts of the United States have the right to apportion the waters

and natural resources of one state so as to afford the benefits thereof to another state, then we suggest that equal justice must be done to all interested parties and that no greater benefits should run to the land owners in one state than are granted to those in the other.

Hence, it was urged in the case at bar, that the riparian owners of lands in Colorado had as much right to insist upon the protection of the riparian laws of Nebraska as the Nebraska land owners had the right to insist upon the protection of a selected part, but not all, of the laws of Colorado, and that if the state line were to be moved easterly for purpose of complainant's canal, respondents had the right to demand that it should be moved westerly for the benefit of their lands, and that inasmuch as those lands had gone to patent prior to 1889 (R., 18) that they were entitled to the use of the waters of the North Fork of the Republican River as against the claims of complainant. It is apparent that, whether the waters of the stream be retained by the Colorado lands by reason of their riparian location or by reason of the protection of the state line, the effect is the same.

In the case of *Anderson vs. Bassman,* 140 Fed., 14, decided prior to *Kansas vs. Colorado,* 206 U. S., 46, and doubtless controlled by the latter case, the facts in the present case were reversed. There the upper state, California, recognized the riparian law in the same manner that Nebraska here recognizes the same rule, while the lower state, Nevada, recognized the doctrine of prior appropriation, as does the upper state (Colorado) in this case. But in that case the complainants were water users in Nevada who con-

tended that the water of the streams should be turned down from California to supply their alleged prior appropriations, but the District Court did not grant the relief sought by complainants, and on the other hand, decided that the water should be equitably apportioned between the users in the two states, saying:

> "The law would not justify a decree giving all the water of the West Fork of the Carson River to the complainants without any diminution on the part of the defendants above for irrigation and domestic purposes, nor will the law justify a decree giving to the defendants all the water of the stream for like purposes to the exclusion of the complainants below. The right of each is to have a reasonable apportionment of the water of the stream during the season of the year when it is scarce. But to divide the water so as to allow a certain number of inches to the complainants and a certain number of inches to the defendants is plainly impracticable. The only method that appears to provide a just and equitable division is some fair and appropriate division in time by which the complainants and defendants shall have the use of the water alternately during the dry season. I shall, therefore, direct that a decree be entered restraining the defendants from diverting the waters of the West Fork of the Carson River in excess of five days in every ten days during the months of June, July, August, September and October in each year, and that the defendants be restrained at all

> times from placing manure or other polluting substance in the dams." (140 Fed., 29).

So in the case at bar, if it be determined that the District Court had jurisdiction, which we respectfully urge that it had not, then in order to do equity between the users of water from this interstate stream it will be necessary to apportion the waters in such a manner that all the lands in both states receive equal treatment and equal benefits from the common resource. In order to bring about this result it was not only necessary that the rights of a few of the interested landowners should be considered but that the rights of all the landowners holding forty-acre tracts riparian to the North Fork of the Republican River in Colorado should be determined, and that the law of both states should be so considered and given extra-territorial effect that justice might be done with all interested parties.

If the court had the power, which we respectfully urge it did not, to override the laws of Colorado and to place a different interpretation upon those laws than that adopted by the people of the state and its courts, by brushing aside the prohibition against the diversion of waters in Colorado for use upon lands in the neighboring state and by substituting its own decree for that of the laws and decisions of the state, and had the power to take away from the Colorado riparian landowners the benefits of the stream in order that the waters might be given to non-riparian as well as riparian landowners in Nebraska, then, we urge, that the court should have given the same benefit of the use of the waters of the stream to the Colorado riparian landowners as would

obtain in Nebraska if the lands were situate in that state, all of the Colorado lands irrigated from the stream, in this case, being riparian as interpreted by the laws and decisions of Nebraska (R., 18). This the District Court did not do, but left the rights of the riparian landowners in Nebraska undisturbed while taking the water from the riparian landowners in Colorado and giving it, over the objection and contrary to the laws of Colorado, to Nebraska for use upon non-riparian lands.

(2)—Equitable Apportionment of the Benefits of the Stream.

The respondents asserted, both by their answer (R., 11-13) and their offer of proof at the trial (R., 21), that if the District Court assumed jurisdiction to try the case at all, which respondents urged it should not, then the District Court should consider the stream as a whole and should conform, in its trial of the case, to the rules laid down by this court for the determination of the rights of water users upon an interstate stream where the rule of appropriation obtains in the upper state, limited entirely to use upon lands within its borders, and the rule of riparian rights or a mixed doctrine of riparian rights and appropriation obtains in the lower state, as is here the case.

The District Court had assumed jurisdiction and proceeded to the trial of the case and the respondents insisted that the rules laid down in *Kansas vs. Colorado*, 185 U. S., 125; 206 U. S., 46, should apply. The rule is thus stated by Chief Justice Fuller in 185 U. S., 147:

> "We think proof should be made as to whether Colorado is herself actually threatening to wholly exhaust the flow of the Arkansas River in Kansas; whether what is described in the bill as the 'underflow' is a subterranean stream flowing in a known and defined channel, and not merely water percolating through the strata below; whether certain persons, firms and corporations in Colorado must be made parties hereto; what lands in Kansas are actually situated on the banks of the river, and what, either in Colorado or Kansas, are absolutely dependent on water therefrom; the extent of the watershed or the drainage area of the Arkansas River; the possibilities of the maintenance of a sustained flow through the control of flood waters; in short, the circumstances, a variation in which might induce the court to either grant, modify or deny the relief sought or any part thereof."

And Mr. Justice Brewer upon the final hearing of the case:

> "We must consider the effect of what has been done upon the conditions in the respective states, and so adjust the dispute upon a basis of equality of rights as to secure as far as possible to Colorado the benefits of irrigation without depriving Kansas of the like beneficial effects of a flowing stream" (206 U. S., 46, 100).

With this end in view, respondents offered to prove that each forty-acre tract of land now irrigated in Colorado from the North Fork of the Republican River is riparian to the stream and had passed by patent from the United States prior to 1889 (R., 18); that the waters of the stream were used by these Colorado riparian landowners by means of their ditches, with economy and without waste; that the greater part of the waters used on these river-valley and riparian lands returns almost immediately to the stream; that the use of the water upon the upper reaches of the stream has been a benefit to the lower lands in that the flow of the stream has been increased during the dry summer months by reason of storage in the soil of the upper valley, and that the underflow of the lower valley has been increased and made more dependable during the months of greatest necessity; that after all uses in Colorado, the major part of all the waters diverted in Colorado return to the stream and flow down into Nebraska and that by reason of the use of the water upon the Colorado lands, the Nebraska lands enjoy a greater use of and derive a greater benefit from the waters of the stream than would be obtained were no diversions made in Colorado; and that, the stream taken as a whole, the landowners in Colorado do not consume more than an equitable portion of the waters of the stream (R., 18 to 22, incl.).

The District Court denied the offer of proof made by respondents and refused to consider such as previously admitted and proceeded to a consideration of the case as though the state line had been moved easterly so as to include the Nebraska lands. The

court diregarded the Constitution, laws and decisions of the State of Colorado, gave no consideration to the defense that the whole matter had been conclusively determined by the decree of a state court of Colorado and was *res judicata* between the parties to the case at bar and, by proceeding as though the lands served by the canal were wholly within Colorado, decreed upon the Colorado stream a perpetual burden of serving the lands in Nebraska in preference to serving the lands in Colorado. While we still urge that the District Court had no jurisdiction of the suit, and should have dismissed the case, nevertheless, conceding for the moment but not admitting, that the court could entertain the suit, it would appear that the District Court did not so proceed and its decree was not such that equity and justice could be or was accorded respondents and that the court committed error in refusing to consider all the proof adduced and offered, before entering decree.

III.

Conclusion.

In conclusion, for the several reasons above assigned, we respectfully urge that the District Court had no jurisdiction to entertain or to thereafter try and enter decree in the case at bar; that the Circuit Court of Appeals committed error in deciding that the District Court had jurisdiction of the suit and in affirming the decree thereof, and that the decision of the Circuit Court of Appeals should be reversed and

the case remanded with instructions that the same be dismissed.

Respectfully submitted,

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APPENDIX.

	Page
Part I—Colorado:	
(1) Enabling Act	i
(2) Constitution	v
Part II—Act of Colorado and Act of New Jersey—Prohibiting Diversion of Water Out of State for Use in Other States	vi
Part III—Other Acts of Colorado Legislature Reaffirming Provisions Colorado Constitution	ix
Part IV—Revised Statutes of Colorado, 1908	xi
Part V—Nebraska Statutes	xxxv

PART I.

COLORADO.

Enabling Act and Constitutional Provisions.

(1) ENABLING ACT.

An Act to Enable the People of Colorado to Form a Constitution and State Government, and for the Admission of the Said State into the Union on an Equal Footing with the Original States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

Section 1.—**Authority to Form State.**—That the inhabitants of the territory of Colorado included in the boundaries hereinafter designated, be, and they are hereby authorized to form for themselves, out of said territory, a state government, with the name of the state of Colorado; which state, when formed, shall be admitted into the Union **upon an equal footing with the original states in all respects whatsoever,** as hereinafter provided.

(Sec. 2 defined the boundaries and Sec. 3 provided for calling constitutional convention.)

Sec. 4. **Constitutional convention—Requirements of constitution.**—That the members of the convention thus elected shall meet at the capital of said territory, on a day to be fixed by said governor, chief justice, and United States attorney, not more than

sixty days subsequent to the day of election, which time of meeting shall be contained in the aforesaid proclamation mentioned in the third section of this act, and after organization, shall declare, on behalf of the people of said territory, that they adopt the constitution of the United States; whereupon the said convention shall be and is hereby authorized to form a constitution and state government for said territory; Provided, That the constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, and not be repugnant to the constitution of the United States and the principles of the declaration of independence; And, provided further, That said convention shall provide by an ordinance irrevocable without the consent of the United States and the people of said state; First, That perfect toleration of religious sentiment shall be secured, and no inhabitant of said state shall ever be molested in person or property, on account of his or her mode of religious worship; Secondly, That the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States; and that the lands belonging to citizens of the United States residing without said state shall never be taxed higher than the lands belonging to residents thereof, and that no taxes shall be imposed by the state on lands or property therein belonging to, or which may hereafter be purchased by the United States.

Sec. 5. **Adoption of constitution—President proclaim.**—That in case the constitution and state government shall be formed for the people of said territory of Colorado, in compliance with the provisions of this act, said convention forming the same shall provide by ordinance for submitting said constitution to the people of said state for their ratification or rejection, at an election to be held at such time, in the month of July, eighteen hundred and seventy-six, and at such places and under such regulations as may be prescribed by said convention, at which election the lawful voters of said new state shall vote directly for or against the proposed constitution; and the returns of said election shall be made to the acting governor of the territory, who, with the chief justice and United States attorney of said territory, or any two of them, shall canvass the same; and if a majority of the legal votes shall be cast for said constitution in said proposed state, the said acting governor shall certify the same to the president of the United States, together with a copy of said constitution and ordinances, **whereupon it shall be the duty of the president of the United States to issue his proclamation declaring the state admitted into the Union on an equal footing with the original states,** without any further action whatever on the part of congress.

Sec. 6. **One representative—Officers—Election.**—That until the next general census said state shall be entitled to one repre-

sentative in the house of representatives of the United States, which representative, together with the governor and state and other officers provided for in said constitution, shall be elected on a day subsequent to the adoption of the constitution, and to be fixed by said constitutional convention; and until said state officers are elected and qualified under the provisions of the constitution, the territorial officers shall continue to discharge the duties of their respective offices.

Sec. 7. **School lands.**—The sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of congress, other lands equivalent thereto in legal sub-divisions of not more than one quarter-section, and as contiguous as may be, are hereby granted to said state for the support of common schools.

Sec 8. **Land for public buildings.**—That, provided the state of Colorado shall be admitted into the Union in accordance with the foregoing provisions of this act fifty entire sections of the unappropriated public lands within said state, to be selected and located by direction of the legislature thereof, and with the approval of the president, on or before the first day of January, eighteen hundred and seventy-eight, shall be and are hereby granted, in legal sub-divisions of not less than one quarter-section, to said state for the purpose of erecting public buildings at the capital of said state, for legislative and judicial purposes, in such manner as the legislature shall prescribe.

Sec. 9. **Land for penitentiary.**—That fifty other entire sections of land as aforesaid, to be selected and located and with the approval as aforesaid, in legal sub-divisions as aforesaid, shall be, and they are hereby granted, to said state for the purpose of erecting a suitable building for a penitentiary or state prison in the manner aforesaid.

Sec. 10. **Land for university.**—That seventy-two other sections of land shall be set apart and reserved for the use and support of a state university, to be selected and approved in manner as aforesaid, and to be appropriated and applied as the legislature of said state may prescribe for the purpose named and for no other purpose.

Sec. 11. **Salt springs.**—That all salt springs within said state not exceeding twelve in number, with six sections of land adjoining, and as contiguous as may be to each, shall be granted to said state for its use, the said land to be selected by the governor of said state within two years after the admission of the state, and when so selected to be used and disposed of on such terms, conditions and regulations as the legislature shall direct; Provided, That no salt spring or lands, the right whereof is now vested in any individual or individuals, or which hereafter shall be confirmed or adjudged to any individual or individuals, shall by this act be granted to said state.

Sec. 12. **Sale of agricultural lands.**—That five per centum of the proceeds of the sales of agricultural public lands lying within said state, which shall be sold by the United States subsequent to the admission of said state into the Union, after deducting all the expenses incident to the same, shall be paid to the said state for the purpose of making such internal improvements within said state as the legislature thereof may direct; Provided, That this section shall not apply to any lands disposed of under the homestead laws of the United States, or to any lands now or hereafter reserved for public or other uses.

Sec. 13. **Unexpended balance of appropriations.**—That any balance of the appropriations for the legislative expenses of said territory of Colorado remaining unexpended, shall be applied to and used for defraying the expenses of said convention, and for the payment of the members thereof, under the same rules and regulations and rates as are now provided by law for the payment of the territorial legislature.

Sec. 14. **School lands—How sold.**—That the two sections of land in each township herein granted for the support of common schools shall be disposed of only at public sale and at a price not less than two dollars and fifty cents per acre, the proceeds to constitute a permanent school fund, the interest of which to be expended in the support of common schools.

Sec. 15. **Mineral lands excepted.**—That all mineral lands shall be excepted from the operation and grants of this act.

Approved March 3, 1875. (18 Stat. at L. — U. S. —, p. 474.)

[The constitution as submitted by the constitutional convention was adopted by the people March 14, 1876, and the state became admitted to the Union by the proclamation of President Grant, dated August 1, 1876.]

(The new states were admitted upon an equality with the original thirteen, have the same powers and attributes of sovereignty. No provisions in the enabling acts admitting new states can have the effect of limiting or restricting their powers, and any such provision would be void.

United States v. Harris, 106 U. S. 629, 635;
Kansas v. Colorado, 206 U. S. 46, 87;
McGilvray v. Ross, 215 U. S. 70;
Coyle v. Oklahoma, 221 U. S. 559;
Scott v. Lattig, 227 U. S. 229;
Hawkins v. Bleakly, 243 U. S. 210, 217;
United States v. Cress, 243 U. S. 316.)

(2) CONSTITUTION.

ARTICLE XVI.

Mining and Irrigation.

Irrigation.

Sec. 5. **Water, public property.**—The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

Sec. 6. **Diverting unappropriated water — Priority.** — The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.

Sec. 7. **Right of way for ditches, flumes.**—All persons and corporations shall have the right of way across public, private and corporate lands for the construction of ditches, canals and flumes for the purpose of conveying water for domestic purposes, for the irrigation of agricultural lands, and for mining and manufacturing purposes, and for drainage, upon payment of just compensation.

Sec. 8. **County commissioners fix rates for water.**—The general assembly shall provide by law that the board of county commissioners in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations.

PART II.

ACT OF COLORADO AND ACT OF NEW JERSEY—PROHIBITING DIVERSION OF WATER OUT OF STATE FOR USE IN OTHER STATES.

See construction New Jersey Act, Hudson Co. Water Co. v. McCarter, 209 U. S. 349, 70 New Jersey Equity 525 and 695.

NEW JERSEY.

P. L. 1905, p. 461 (70 N. J. Equity, p. 698).

An Act "To preserve and maintain the lakes, ponds, brooks, creeks, rivers and streams of this state, and to prevent the waters thereof from being carried by pipes, conduits, ditches or canals into other states for use therein, and to authorize the court of chancery to assist in the observance of this act.

Whereas, The available waters of the fresh-water lakes, ponds, brooks, creeks, rivers and streams of this state do not increase with the growth of population, and, unless the same are carefully preserved, will become inadequate to perform the functions they were by nature designed to do, which functions are essential to the health and prosperity of all the citizens of this state; therefore,

Be it enacted by the General Assembly of the State of New Jersey:

1. It shall be unlawful for any person or corporation to transport or carry through pipes, conduits, ditches or canals the waters of any fresh-water lake, pond, brook, creek, river or stream of this state into any other state for use therein.

2. It shall be the duty of the state geologist to keep a general oversight over the fresh-water lakes, ponds, brooks, creeks, rivers and streams of this state, and to see that the same are preserved for the use and benefit of the citizens and inhabitants of this state, and to prevent the waters thereof from being carried or transported by pipes, conduits, ditches or canals into other states for use therein; upon its being brought to his knowledge that it is the intention of any person or corporation to so carry or transport into any other state for use therein, the waters of any such fresh-water pond, lake, brook, creek, river or stream of this state, it shall be his duty, through the attorney general, to apply to the court of chancery for injunction to restrain the same, and the court of chancery is hereby authorized and empowered to entertain jurisdiction of a suit in equity to preserve the waters aforesaid for the use and benefit of the citizens and inhabitants of this state, and to prevent their being, by pipes, conduits, ditches or canals, carried or transported to other states for use therein; and to that end to issue such restraining order or injunction, both preliminary and final, as may be necessary, and to enforce the

same in the same manner it is empowered to enforce other injunctions or orders.

3. This act shall take effect immediately.

Approved May 11th, 1905."

COLORADO.

S. L. 1917, Ch. 151, p. 539.

An Act "To preserve and maintain the waters of the state of Colorado and to prevent the diversion, carriage and conveyance thereof into other states for use therein, and to authorize the district and supreme courts to enforce the provisions hereof.

Be it enacted by the General Assembly of the State of Colorado:

Section 1. For the purpose of aiding and preserving unto the state of Colorado and all its citizens the use of all the waters of the springs, lakes, ponds, creeks, rivers, streams and water-courses of this state, which waters do not increase with the growth of population and which are necessary for the health and prosperity of all the citizens of the state of Colorado, and for the growth, maintenance and general welfare of the state, it shall be unlawful for any person, corporation or association to divert, carry or transport by ditches, canals, pipes, conduits, natural streams, or water-courses, the waters of any springs, reservoir, lake, pond, creek, river, stream or water-course of this state into any other state for use therein.

Section 2. It shall be the duty of the state engineer, the division engineers and the water commissioners of this state, to see that the waters of the state are preserved for the use and benefit of the citizens and inhabitants of the state for its growth, prosperity and general welfare, and to prevent the waters thereof from being diverted, carried, conveyed or transported by ditches, canals, pipes, conduits, natural streams or water-courses, into other states for use therein, and upon its being brought to the knowledge of the state engineer of Colorado that any person, corporation or association is carrying or transporting any of such waters into any other state for use therein, or is intending so to do, it shall be his duty to immediately call the matter to the attention of the attorney general, who shall, in behalf of and in the name of the state, apply to any district court or to the supreme court of the state of Colorado, for such restraining orders or injunctions, both preliminary and final, as may be necessary to enforce the provision of this act and jurisdiction is conferred upon said courts for such purposes.

Section 3. In the opinion of the general assembly this act is necessary for the immediate preservation of the public peace, health and safety.

Section 4. In the opinion of the general assembly an emergency exists, therefore this act shall be in force and take effect from and after its passage.

Approved March 30, 1917."

(Note—A similar act was passed by the state of California March 3, 1911, immediately following the decision by this court in the case of

Rickey Land and Cattle Co. v. Miller & Lux, 218 U. S. 258.

See S. L. California, 1911, Chap. 104, p. 271.

See also:

Walbridge v. Robinson, 22 Idaho 240;
Turley v. Furman, 16 New Mexico 253;
Grover Irr. Co. v. Lovella D. Co., 21 Wyo. 204;
Lamson v. Vailes, 27 Colo. 201; and
Stockman v. Leddy, 55 Colo. 24.)

PART III.

OTHER ACTS OF COLORADO LEGISLATURE REAFFIRMING PROVISIONS COLORADO CONSTITUTION.

Act of April 10, 1903, provided for defense of case of Kansas v. Colorado "and for the protection of the natural streams of Colorado for irrigation, wherever threatened," and appropriated $25,000 for such purpose.

S. L. 1903, Chap. 2, p. 23.

The carrying out of the provisions of the above act, and subsequent similar acts, terminated in 1907.

S. L. 1907, Chap. 57, p. 136.

Act of May 2, 1909, directed the attorney general to institute suits to defend the waters of the state, and appropriated $20,000 therefor.

S. L. 1909, Chap. 83, p. 199.

Act of May 11, 1911, appointed a joint legislative committee with full powers to investigate and

"Ascertain whether or not the right of this state to control the distribution of the waters thereof within its borders is thereby in any way unlawfully limited or interfered with or infringed upon * * * and to investigate and determine what claims are made by or upon behalf of any state or corporation or individual thereof to the waters of any stream or streams originating or flowing in the state of Colorado to the detriment of the interests of this state and the citizens thereof or the appropriators and users of said waters; and to examine into all matters by which the state's right to control the waters thereof may be affected * * * said committee is hereby empowered to authorize prosecution or defense of such action or actions as it may deem proper to determine or to protect the rights of the state."

The sum of $50,000 was appropriated to carry out the provisions of the bill.

S. L. 1911, Ch. 227, p. 671.

Act of February 25, 1913, after reciting the attacks then pending and threatened against the state and its waters, appropriated $50,000 to pay the expenses of bringing suits, etc., "for protection of the right to use the water of the natural streams of Colorado."

S. L. 1913, Ch. 100, p. 381.

Act of February 24, 1915, was similar and made the same appropriation as that of 1913.

S. L. 1915, Ch. 21, p. 93.

Act of April 21, 1917, made an appropriation of $50,000 for defraying expenses of all suits "for the protection of the right to use the water of the natural streams of Colorado * * * wherever threatened," etc.

S. L. 1917, Ch. 33, p. 108.

In an act permitting the sale, by an irrigation district, of its water system, the following appears:

"The sale herein provided for may be made to any person or persons, to a corporation organized under the laws of the state of Colorado, or may be made to the United States, but no sale of water rights shall in any manner impair or be deemed to relinquish any of the sovereign rights of the state of Colorado in the waters of the state or to control and regulate the diversion, use and distribution thereof."

S. L. Colo., 1917, Ch. 86, Sec. 5, p. 324.

In an act introduced at the instance of the reclamation service to permit state and government co-operation in construction of irrigation projects in Colorado the following proviso occurs:

"But, however, all water which has been or is acquired by the district by virtue of the laws of Colorado may be distributed and apportioned according to the terms of any contract entered into between the district and the United States, until the obligation due the United States is paid or the obligation to pay is discharged in any manner; but nothing in this act contained shall be deemed or construed to grant or relinquish unto the United States any of the sovereign rights of the state of Colorado in and to the waters within its borders, or its exclusive authority over and jurisdiction and control of said waters, and the diversion, appropriation and use thereof, nor in any manner change the methods of appropriation thereof."

S. L. 1917, Ch. 83, Sec. 3, p. 296.

PART IV.

REVISED STATUTES OF COLORADO, 1908.

Chapter LXXII. and Amendments.

(This chapter includes the irrigation code of Colorado. It consists of ten subdivisions and covers 300 sections of the Revised Statutes.

Only those portions bearing upon the adjudication of priorities and the state water officials and their duties are here quoted.

The first part of the code, Secs. 3165-3204 inclusive, are general provisions regarding the rights of appropriators, etc.)

3205. Construction of reservoirs—State engineer supervise.—Sec. 41. No reservoir of a capacity of more than seventy-five millions cubic feet of water, or having a dam or embankment in excess of ten feet in vertical height, and covering an area of more than 20 acres shall hereafter be constructed in this state, except the plans and specifications of the same shall first be approved by the state engineer; and the state **engineer shall act as consulting engineer during the construction thereof, and shall have authority to require the material used and the work of construction to be done to his satisfaction**; and no work shall be deemed complete under the provisions of this act until the state engineer shall give to the owners of such structures a written statement of the work of construction and the full completion thereof, together with his acceptance of the same, which statement shall specify the dimensions and capacity of such reservoir or reservoirs. [L. '99 p. 314, §1.

3207.—Engineer determine amount of water to be stored.—Sec. 43. The **state engineer shall annually determine the amount of water which it is safe to impound in the several reservoirs within this state,** and it shall be unlawful for the owners of any reservoir to store in said reservoir water in excess of the amount so determined by the state engineer to be safe. [L. '99, p. 315, §3.

3208. Water commissioner withdraw excess water—Close Inlets.—Sec. 44. In the event of the owners of any such reservoir impounding water therein to a depth greater than that **determined by the state engineer** to be safe, it shall be the duty of the **water commissioner** of the district wherein such reservoir **shall** be located, to forthwith proceed to **withdraw** from said reservoir so much of the water so impounded therein as shall be in **excess** of the **amount** so **determined by the state engineer to be safe,** and shall close the inlets to the same so as to prevent said reservoir from being refilled to an amount beyond what said state engineer shall have designated as being safe. In the event of the owners of said reservoir, or any other person or persons, interfering with the water commissioner in the discharge of said duty, the said water commissioner shall call to his aid such persons as he deems necessary, and employ such force as the circumstances demand to

enable him to comply with the requirements of this section. [L. '99, p. 315, §4.

3209. Complaint that reservoir is unsafe—Duty of engineer.—Sec. 45. Upon complaint being made to the **state engineer** by three or more persons residing or having property in such a location that their homes or property would be in danger of destruction or damage in the event of a flood occurring on account of the breaking of the embankment of any reservoir within the state, **that said reservoir is in an unsafe** condition, or that it is being filled with water to such an extent as to render it unsafe, it shall be the **duty of the state engineer** to forthwith examine said reservoir and determine the amount of water it is safe to impound therein. If, upon such examination, the state engineer shall find that said reservoir is unsafe, or is being filled with water to such an extent as to render it unsafe, it shall be his duty to immediately cause said water to be drawn off from said reservoir, to such an extent as will, in his judgment, render the same safe. If water is then flowing into said reservoir, he shall cause the same to be discontinued. [L. '99, p. 315, §5.

3210. Engineer may use force—Violation of engineer's order.—Sec. 46. The **state engineer** is hereby authorized and **empowered to use such force** as is necessary to perform the duties required of him in the preceding section, and to have and exercise all of the powers conferred upon the water commissioner by Section 4 of this act. If, after any of such reservoirs shall have been examined by said state engineer, the owners thereof, or any other person or persons, shall fill or attempt to fill them, or either of them to a point in excess of the amount the state engineer shall have determined to be safe, then it shall be the duty of the water commissioner of the district wherein such reservoir is located to proceed as is directed by Section 4 of this act. [L. '99, p. 316, §6.

3212. Appeal from decision of engineer.—Sec. 48. In the event of **either party** being dissatisfied with the decision of the state engineer, they **may** take an **appeal** to the **county, or district court** of the county wherein said reservoir is located, and said court shall hear and determine the matter summarily at the earliest practical time without written pleadings or the aid of a jury; subject to the right of either party to take an appeal or writ of error as in other civil cases; Provided, That the judgment of the state engineer shall control until final determination of the cause. [L. '99, p. 316, §8.

3214. Violation of act—Penalty—Disposition of fines.—Sec. 50. Any reservoir company failing or refusing, after ten days' notice in writing having been given, to **obey the directions** of the **state engineer as to the construction or filling of any reservoir** as herein provided, shall be subject to a fine of not less than fifty dollars, for each offense, and each day's continuance after time of notice has expired shall be considered a separate offense; such fines to be recovered by civil action in the name of the people, by

the district attorney, upon the complaint of the state engineer, and in the county where the injury complained of occurred, the proceeds of all fines, after payment of costs and charges of the proceedings, shall be paid into the county treasury for the use of the general fund of the county. [L. '99, p. 317, §10.

3222. Exchange of water, less seepage.—Sec. 58. That whenever any person or company shall divert water from one public stream and turn it into another public stream, such person or company may take out the same amount of water again, less a reasonable deduction for seepage and evaporation, **to be determined by the state engineer.** [L. '97, p. 176, §1.

3223. Must maintain flumes and register water.—Sec. 59. Any person or company transferring water from one public stream to another shall be required to construct and maintain **under the direction of the state engineer** measuring flumes or weirs and self-registering devices at the point where the water leaves its natural watershed and is turned into another, and also at the point where it is finally diverted for use from the public stream. [L. '97, p. 176, §2.

3224. Water commissioner keep record.—Sec. 60. It shall be the **duty** of the **water commissioner** of the district in which the water is used to **keep a record** of the amount of water so turned into his district from any other district. [L. '97, p. 176, §3.

3225. Reservoirs and ditches may exchange.—Sec. 61. When the rights of others are not injured thereby, it shall be lawful for the owner of a reservoir to deliver stored water into a ditch entitled to water or into the public stream to supply appropriations from said stream, and take in exchange therefor from the public stream higher up an equal amount of water, less a reasonable deduction for loss, if any there be, to be determined by the state engineer; Provided, That the person or company desiring such exchange shall be required to construct and maintain **under the direction of the state engineer** measuring flumes or weirs and self-registering devices at the point where the water is turned into the stream or ditch taking the same or as near such point as is practicable, so that the water commissioner may readily determine and secure the just and equitable change of water as herein provided. [L. '97, p. 177, §4.

3232. Owner may exchange or loan water right.—Sec. 68. It shall be lawful, however, for the owners of ditches and water rights taking water from the same stream, to exchange with, and loan to, each other, for a limited time, the water to which each may be entitled, for the purpose of saving crops or of using the water in a more economical manner; Provided, That the owner or owners making such loan or exchange, shall give notice in writing, signed by all the owners participating in said loan or exchange, stating that such loan or exchange has been made, and for what length of time the same shall continue, whereupon

said **water commissioner** shall recognize the same in his distribution of water. [L. '99, p. 236, §3.

3252. (As amended S. L., 1911, p. 463, 466). All headgates, measuring weirs, flumes and devices used in connection with canals, flumes, ditches or reservoirs for the measuring and delivery of water therefrom and thereto, shall be **under the supervision and control at all times of the state engineer,** the **division engineer** of the water division, **and** the **water commissioner** of the water district wherein such headgates, measuring weirs, flumes and devices are located.

3253. (As amended S. L., 1911, p. 463, 466). The owner or owners of any reservoir, situate upon or in the bed of any natural stream or through which any natural stream flows, for the purpose of storing or diverting water, shall, at the expense of the owner or owners, cause a complete survey of the contour lines of said reservoir to be made, which said **survey** may be **approved** by the **state engineer, or,** in the discretion of the state engineer, shall be made under the **supervision** of the **state engineer,** or his deputy **or** the **division engineer** of the division in which such reservoir is located. Said contour lines shall be ascertained for at least every vertical foot in depth, and in all cases where deemed necessary by the state engineer, for fractions of a foot. There shall be prepared a table to be filed in triplicate with, and approved by the state engineer, showing the capacity of said reservoir, in cubic feet, for each foot in depth or fraction thereof, one copy of which said table shall be furnished to the division engineer and one copy to the water commissioner in whose district such reservoir is situate. All maps, plats, field notes and the table of such reservoir, survey and capacity shall be filed with and **approved** by the **state engineer,** and remain a part of the records of his office. The owner or owners of such reservoir shall, at their own expense, under the **supervision** and with the approval of the **state engineer,** permanently fix and maintain a gauge rod at or near the outlet of such reservoir, marked in feet and tenths and one-hundreths of a foot, and in correspondence with the contour lines, from, and by means of which the amount of water stored in, or taken from, said reservoir may be correctly ascertained, and shall, at the expense of such owner or owners, and under the **supervision** and with the approval of the **state engineer,** construct and permanently maintain a suitable and permanent measuring weir or flume equipped with self-registering devices, according to plans and specifications approved by the state engineer, in the bed and channel of every natural stream or water course discharging waters into said reservoir, by means of which all of the water flowing into said reservoir from and through each such stream or water course, may at all times be definitely ascertained and determined. Such gauge rods, flumes or weirs and devices, shall be at all times subject and open to inspection by the owner or duly authorized agent or representative

of the owner or owners of any appropriation of water from the stream upon or in which such reservoir is constructed or operated.

Upon the failure or neglect of the owner or owners of any such reservoir to construct or permanently maintain such gauge rods, measuring flumes or weirs, equipped as herein provided; or upon the failure or neglect of such owner or owners to cause complete survey of the contour lines of said reservoir to be made, after thirty days' notice in writing, directing such contour survey to be made, duly served upon such owner or owners, or their agent or employee, by the state engineer or division engineer, the **state engineer** or **division engineer shall refuse to allow any water whatsoever to be taken into or diverted from or by means of said reservoir**; provided, however, that when suitable weirs, flumes, gauge rods and measuring devices have been installed and equipped, as herein provided, the state engineer and division engineer may allow water to be stored in any such reservoir or reservoirs after thirty days have expired after the giving of said notice, in the event that the survey of said contour lines is then being prosecuted in good faith.

Upon complaint in any manner made to the state engineer or the division engineer by the owner or owners of any appropriation of water, from any stream upon which any such reservoir is located, or any stream of which such stream is a tributary, charging a violation of any of the requirements of this section, the state engineer or division engineer shall thereupon forthwith inquire into the truth of such complaint, and if the charges are found to be true, shall enforce the provisions and penalties of this section.

3258. Water commissioner measure water—Failure.—Sec. 94. **Any water commissioner,** or his deputy, or assistant, who shall wilfully **neglect** or **refuse,** after being called upon in accordance with Section 1758 of the General Statutes of the state, to **promptly measure water from the stream,** or other source of supply, into the irrigating canals or ditches, in his district, according to their respective priorities, to the extent to which water may be actually necessary for the irrigation of lands under such canals or ditches, shall be deemed guilty of a misdemeanor, and shall be subject to the same penalty as provided in Section 4 of this act. [L. '87, p. 305, §5.

[G. S., Section 1758 above referred to is Section 3430.]

IV. ADJUDICATION OF PRIORITIES.

A. Proceedings Before Court.

3276. Adjudication of irrigation priorities—Jurisdiction of courts.—Sec. 112. **For the purpose of hearing, adjudicating and settling all questions** concerning the priority of appropriation of water between ditch companies and other owners of ditches drawing water for irrigation purposes from the same stream or its

tributaries within the same water district, **and all other questions of law and questions of right growing out of or in any way involved or connected therewith,** jurisdiction is hereby vested **exclusively in the district court** of the proper county; but when any water district shall extend into two or more counties, the district court of the county in which the first regular term after the first day of December in each year shall soonest occur, according to the law then in force, shall be the proper court in which the proceedings for said purpose, as hereinafter provided for, shall be commenced; but where said proceedings shall be once commenced, by the entry of an order appointing a referee in the manner and for the purpose hereinafter in this act provided, such court shall thereafter retain exclusive jurisdiction of the whole subject until final adjudication thereof is had, notwithstanding any law to the contrary now in force. [G. S., §1762; L. '79, p. 99, §19.

3277. Filing statements of claim—Contents.—Sec. 113. In order that all parties may be protected in their lawful rights to the use of water for irrigation, every person, association or corporation owning or claiming any interest in any ditch, canal or reservoir, within any water district, shall, on or before the first day of June, A. D. 1881, file with the clerk of the district court having jurisdiction of priority of right to the use of water for irrigation in such water district, a statement of claim, under oath, entitled of the proper court, and in the matter of priorities of water rights in district number —, as the case may be, which statement shall contain the name or names, together with the postoffice address of the claimant or claimants claiming ownership, as aforesaid, of any such ditch, canal or reservoir, the name thereof (if any), and, if without a name, the owner or owners shall choose and adopt a name, to be therein stated, by which such ditch, canal or reservoir shall thereafter be known, the description of such ditch, canal or reservoir as to location of headgate, general course of ditch, the name of the natural stream from which such ditch, canal or reservoir draws its supply of water, the length, width, depth and grade thereof, as near as may be, the time, fixing a day, month and year as the date of the appropriation of water by original construction, also by any enlargement or extension, if any such thereof may have been made, and the amount of water claimed by or under such construction, enlargement or extension, and the present capacity of the ditch, canal or feeder of reservoir, and also the number of acres of land lying under and being, or proposed to be, irrigated by water from such ditch, canal or reservoir. Said statement shall be signed by the proper party or parties. [G. S., §1763; L. '81, p. 142, §1.

3284. Petition to adjudicate—Order—Hearing—Decree—Certificate by clerk.—Sec. 120. When, at any time after the first day of June, A. D. 1881, any one or more persons, associations or corporations, interested as owners of any ditch, canal or reservoir

in any water district shall present to the district court of any county having jurisdiction of priority of rights to the use of water for irrigation in such water district according to the provisions of an act entitled "An act to regulate the use of water for irrigation and providing for settling the priority of rights thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation of use," or to the judge thereof in vacation, a motion, petition or application in writing, moving or praying said court to proceed to an adjudication of the priorities of rights to use of water for irrigation between the several ditches, canals and reservoirs in such district, the court, or judge thereof in vacation, shall, without unnecessary delay, in case he shall deem it practicable to proceed in open court, as prayed for, by an order to be entered of record upon such motion, petition or application, appoint a day, in some regular or special term of said court, for commencing to hear and take evidence in such adjudication, at which time it shall be the duty of the court to proceed to hear all evidence which may be offered by or on behalf of any person, association or corporation, interested in any ditch, canal or reservoir, in such district, either as owner or consumer of water therefrom in support of or against any claim or claims of priority of appropriation of water made by means of any ditch, canal or reservoir, or by any enlargement or extension thereof in such district, and consider all such evidence, together with any and all evidence, if any, which may have been heretofore offered and taken in such district in the same matter by any referee heretofore appointed under the provisions of said act above herein mentioned, and also the arguments of parties or their counsel, and shall ascertain and find from such evidence, as near as may be, the date of the commencement of such ditch, canal or reservoir, together with the original size and carrying capacity thereof as originally constructed, the time of the commencement of each enlargement or extension thereof, if any, with the increased capacity thereby occasioned, the time spent, severally, in such construction and enlargement, or extension, and re-enlargement, if any, the diligence with which the work was in each case prosecuted, the nature of the work as to difficulty of construction, and all such other facts as may tend to show the compliance with the law, in acquiring the priority of right claimed for each such ditch, canal or reservoir, and determine the matters put in evidence, **and make and cause to be entered a decree determining and establishing** the several priorities of right, by appropriation of water, of the several ditches, canals and reservoirs **in such water district,** concerning which testimony shall have been offered, each according to the time of its said construction and enlargement, or enlargements or extensions, with the amount of water which shall be held to have been appropriated by such construction and enlargements, or extensions, describing such amount by cubic feet per second of time, if the evidence shall show sufficient data to ascertain such cubic feet,

and if not, by width, depth and grade and such other description as will most certainly and conveniently show the amount of water intended as the capacity of such ditch, canal or reservoir, in such decree. Said court shall further order that each and every party interested or claiming any such ditch, canal or reservoir, shall receive from the clerk, on payment of a reasonable fee therefor, to be fixed by the court, **a certificate under seal** of the court showing the date or dates and amount or amounts of appropriations adjudged in favor of such ditch, canal or reservoir, under and by virtue of the construction, extension and enlargements thereof, severally; also specifying the number of said ditch and of each priority to which the same may be entitled by reason of such construction, extension and enlargements. [G. S., §1767; L. '81, p. 144, §4.

[The act above referred to is found L. '79, p. 95-108.]

3285. Copy of decree—Authority of commissioner—Recording—Copy—Evidence.—Sec. 121. The holder of **such certificate** shall exhibit the same to the **water commissioner** of the district when he commences the exercise of his duties, and such water commissioner shall keep a book in which shall be entered a brief statement of the contents of such certificate, and which shall be delivered to his successor, and **said certificate, or statement thereof, in his book, shall be the warrant of authority to said water commissioner for regulating the flow of water in relation to such ditch, canal or reservoir.** Said certificate shall be recorded, at the same rates of charges as in cases of deeds of conveyance, in the records of each county into which the ditch, canal or reservoir, to which such certificate relates, shall extend; and said certificate, or said record thereof, or a duly certified copy of such record, shall be prima facie evidence of so much of said decree as shall be recited therein, in any suit or proceeding in which the same may be relevant. [G. S., §1767; L. '81, p. 146, §5.

(Sections 3286, 3287, 3288 and 3289 provide for giving notice of the adjudication proceedings.)

3290. Court number all ditches—Reservoirs—Number appropriations.—Sec. 126. **The court, in making such decree,** as aforesaid, **shall number the several ditches** and canals in the water district, concerning which adjudication is made, in consecutive order, according to priority of appropriation of water thereby made by the original construction thereof, as near as may be, having reference to the date of each decree as rendered, and shall also number the reservoirs in like manner, separately from ditches and canals, and shall further number each several appropriations of water consecutively, beginning with the oldest appropriation, without respect to the ditches or reservoirs by means of which such appropriations were made; whether such appropriation shall have been made by means of construction, extension or enlargement, which number of each ditch, canal or reservoir, together

with the number or numbers of any appropriations of water held to have been made by means of the construction, extension or enlargement thereof, shall be incorporated in said decree and certificate of the clerk, to be issued to the claimants, as provided in section one of this act, so as to show the order in priority of such ditch or canal, and of such reservoir, and also of such successive appropriation of water pertaining thereto, **for the information of the water commissioner** of the district in distributing water; such numbering to be as near as may be having reference to date of decrees as rendered. [G. S., §1771; L. '81, p. 149, §9.

[Section 1 referred to is Section 3277.]

3291. When court may appoint referee—What referred.—Sec. 127. If for any cause the judge of said court shall deem it impracticable or inexpedient to proceed to hear such evidence in open court, he shall, instead of the order mentioned in section four of this act, make and cause to be entered of record, an order appointing some discreet person, properly qualified, a referee of said court, to whom shall be referred the statement of claim aforesaid on file in said matter, the matter of taking evidence and reporting the same, making an abstract and findings upon the same, and preparing a decree in said adjudication; and also in case of any water district in which a referee has been heretofore appointed, and evidence taken by him under the provisions of the act, the title of which is recited in section four of this act; such evidence so already taken, together with the abstract thereof, and report of the referee who took the same, shall be also referred to said referee, to be appointed as aforesaid, and he shall proceed with his duties as hereinafter provided, first taking an oath of office, such as is required to be taken by referees in other cases under the provisions of the code of civil procedure. [G. S., §1772; L. '81, p. 149, §10.

3292 and 3293. Provide for notice of proceedings before referee.

3294. Who may offer evidence.—Sec. 130. Said referee shall attend at the times and places mentioned in his notice for the purpose therein mentioned; and all persons, associations, choosing to do so, and being interested as owners of or consumers of water from any ditch, canal or reservoir **in said district,** and may also attend by themselves, their agents or attorneys, before said referee, at some one or more of said times and places so appointed, and shall have right to offer any and all evidence they may think advisable for their interests in the matter to be adjudicated, as well in districts in which evidence has been heretofore taken as in other districts. All such evidence as has been heretofore taken, if any, in such district, shall be kept present by said referee, subject to inspection by any party desiring to examine the same for purposes of the investigation. [G. S., §1775, L. '81, p. 151, §13.

[Claim must be filed before party can offer evidence. Section 3316.]

3295. When former evidence may be used.—Sec. 131. Whenever testimony shall or may be taken, in any district created by this act, for the purpose of procuring decree as to appropriation of water, and priorities thereof, under the statutes of this state, any testimony theretofore taken, before any former referee, may be introduced and shall be received as evidence. [L. '85, p. 259, §28.

3296. Powers and duties of referee—Books and records, evidence.—Sec. 132. Said referee shall have power to administer oaths to all witnesses, and to issue subpœnas for witnesses and subpœnas duces tecum, which subpœnas may be served by any party, or constable, or sheriff, or deputy sheriff, and may require witnesses to appear at any of the places appointed by said referee for taking evidence. He shall permit all witnesses to be examined by the parties calling them respectively and to be cross-examined by any party interested, and he shall take all testimony in writing and note all objections offered to any part of the testimony taken, with the cause assigned for the objection, and shall proceed in all other respects as in case of taking depositions. He shall certify all books and papers offered by any one in his own behalf, and preserve them with the testimony offered concerning the same, and in case of books and papers offered in evidence, which shall not be under the control of the party desiring the evidence for which such books may be offered, said referee shall make a true copy of the parts demanded and certify the same, and preserve the same, together with the evidence offered concerning the same and concerning said books and papers, as part of the evidence in the matter. [G. S., §1776; L. '81, p. 151, §14.

3297. Refusal to produce books or papers—Effect.—Sec. 133. No person, association or corporation wilfully refusing to produce any book or paper, if in his or their power to do so, when rightfully demanded for examination and copying, shall be allowed the benefit of any testimony or proofs in his, her or their behalf, in making final adjudication, if the court shall be satisfied, from all the evidence shown concerning such refusal, that the same was wilful. [G. S., §1777; L. '81, p. 152, §15.

3298. What facts to be ascertained by proofs.—Sec. 134. Said referee shall also examine all witnesses to his own satisfaction, **touching any point involved in the matter in question,** and shall ascertain as far as possible the date of the commencement of each ditch, canal or reservoir, with the original size and carrying capacity thereof, the time of the commencement of each enlargement thereof, with the increased carrying capacity thereby occasioned, the length of time spent in such construction or enlargement, the diligence with which the work was prosecuted, the nature of the work as to difficulty of construction, and all such other facts as may tend to show compliance with the law in ac-

quiring the priority of right claimed for such ditch, canal or reservoir, and upon all the facts so obtained shall be determined the relative priorities among the several ditches, canals and reservoirs, the volume or amount of water lawfully appropriated by each, as well as by means of the construction, as by the enlargements thereof, and the time when each such several appropriations took effect. [G. S., §1778; L. '81, p. 152, §16.

(3299, 3300, 3301, 3302 and 3303 provide for punishment for contempt before referee; compensation of referee; fees of witnesses and rights of parties before referee.)

3304. Report of referee—Contents.—Sec. 140. Said referee, upon closing the testimony, shall proceed to carefully examine the same, together with all testimony and proofs which may have been heretofore taken by any former referee in the same district, if any such shall have been taken, under the provisions of said act, the title of which is recited in section four of this act; he shall make an abstract of all the testimony and proofs in his possession, concerning each ditch, canal and reservoir separately, and shall number each ditch and canal in order, and likewise each reservoir, each class consecutively, and also number the several appropriations of water shown by the evidence, all in manner and form as provided in section nine hereof, and shall make a separate finding of all the facts connected with each ditch, canal and reservoir, touching which evidence shall have been offered; and he shall prepare a draft of a decree in accordance with his said findings, in substance the same as the decree mentioned in section four of this act, and conformable also to the provisions of section nine hereof, so far as the same are applicable; which decree, so prepared by him, shall be returned with his report to the court, and he shall file his report with said evidence, abstract and findings, and said decree, with the clerk of the court, and inform the judge of so doing, without delay. [G. S., §1782; L. '81, p. 153, §20.

[Sections 4 and 9 referred to above are Sections 3284 and 3290.]

3305. Filing report—Court proceed to determine—Exceptions—Approval—Entry.—Sec. 141. Upon the filing of said report **the court**, or judge thereof in vacation, shall cause an order to be entered setting some day in a regular or special term of said court as soon as practicable, when the court will proceed to **hear and determine** the report; at which time any party interested may appear by himself or counsel and move **exceptions** to any matter in the **findings or decree made by said referee**, and after hearing the same the court shall, if the decree reported be approved, cause the same to be entered of record, or otherwise such modifications thereof or other decree as shall be found just and conformable to the evidence and the true intent of this act, and to so much of any and all former laws of the state as shall be adjudged consistent herewith. [G. S., §1783; L. '81, p. 154, §21.

3306. Court may dismiss referee—Vacancy—New appointment.—Sec. 142. The district court, or judge thereof in vacation, in case of the death, resignation, illness, absence or other disability of the referee hereby provided for, or for any misconduct in him, or other good cause to such judge appearing, shall appoint such other properly qualified person in his stead as he shall deem proper, who shall proceed without delay to perform all the duties of his office, as herein pointed out, which shall remain unperformed by his predecessor in office. [G. S., §1795; L. '81, p. 159, §33.

(Sections 3307-3312 provide for appeals from the decrees of the district court to the supreme court.)

D. General Provisions.

3313. Suits must be brought in four years—Injunctions—Commissioner's duty.—Sec. 149. Nothing in this act or in any decree rendered under the provisions thereof, shall prevent any person, association or corporation from bringing and maintaining any suit or action whatsoever hitherto allowed in any court having jurisdiction, to determine any claim of priority of right to water, by appropriation thereof, for irrigation or other purposes, at any time within four years after the rendering of a final decree under this act in the water district in which such rights may be claimed, save that no writ of injunction shall issue in any case restraining the use of water for irrigation in any water district wherein such final decree shall have been rendered, which shall affect the distribution or use of water in any manner adversely to the rights determined and established by and under such decree, but injunctions may issue to restrain the use of any water in such district not affected by such decree, and restrain violations of any right thereby established, and the water commissioner of every district where such decree shall have been rendered shall continue to distribute water according to the rights of priority determined by such decree, notwithstanding any suits concerning water rights in such district, until in any suit between parties the priorities between them may be otherwise determined, and such water commissioner have official notice by order of the court or judge determining such priorities, which notice shall be in such form and so given as the said judge shall order. [G. S., § 1796; L. '81, p. 159, § 34.

3314. After four years suit barred.—Sec. 150. After the lapse of four years from the time of rendering a final decree, in any water district, all parties whose interests are thereby affected shall be deemed and held to have acquiesced in the same, except in case of suits before then brought, and thereafter all persons shall be forever barred from setting up any claim to priority of rights to water for irrigation in such water district adverse or contrary to the effect of such decree. [G. S., § 1797; L. '81, p. 160, § 35.

3315. Court may make rules—Act liberally construed.—Sec. 151. The district court, or judge thereof in vacation, shall have power to make all orders and rules consistent with this act which may be found necessary and expedient, from time to time during the progress of the case, for carrying out the intent of this act, and of all parts consistent therewith of the said act, the title of which is recited in section four thereof; as well touching the proceedings in court as of the acts and doings of said referee, for the purpose of securing to any party aggrieved by the acts of said referee or any proceeding of the court, opportunity for redress; and this act shall be construed liberally in all courts, in favor of securing to all persons interested the just determination and protection of their rights. [G. S., § 1786; L. '81, p. 155, § 24.

[Section 4 above referred to is Section 3284.]

3316. Party must file claim before offering evidence.—Sec. 152. No persons, association or corporation representing any ditch, canal or reservoir, shall be permitted to give or offer any evidence before said referee until he, she or they shall have filed a statement of claim in substance the same in all respects as is required to be filed under the provision of section one hereof. [G. S., § 1787; L. '81, p. 155, § 25.

[Section 1 referred to is Section 3277.]

3317. Effect of failure to offer evidence.—Sec. 153. **No claim of priority** of any person, association or corporation, on account of any ditch, canal or reservoir, as to which he, or she, or they shall have failed or refused to offer evidence under any adjudication herein provided for or heretofore provided for by said act, the title of which is recited in section four hereof, **shall be regarded by any water commissioner** in distributing water in times of scarcity thereof, **until** such time as such party shall have by application to the court having jurisdiction, obtained leave and made proof of the priority of right to which such ditch, canal or reservoir shall be justly entitled, which leave shall be granted in all cases upon terms as to notice to other parties interested, and on payment of all costs, and upon affidavits or petition sworn to, showing the rights claimed and the ditches, canals and reservoirs, with the names of the owners thereof against which such priority is claimed, nor **until a decree adjudging such priority to such ditch,** canal or reservoir has **been entered,** and **certificate,** such as mentioned in section four hereof, **shall have been issued** to claimant and presented to the water commissioner. [G. S., § 1784; L. '81, p. 154, § 22.

[Section 4 referred to is Section 3284.]

3318. Re-argument—Review—Limitation two years.—Sec. 154. The district court, or judge thereof in vacation, shall have power to order, for good cause shown, and upon terms just to all parties, and in such manner as may seem meet, a re-argument or

review, with or without additional evidence, of any decree made under the provisions of this act, whenever said court or judge shall find from the cause shown for that purpose by any party or parties feeling aggrieved, that the ends of justice will be thereby promoted; but no such review or re-argument shall be ordered unless applied for by petition or otherwise within two years from the time of entering the decree complained of. [G. S., § 1788; L. '81, p. 156, § 26.

V. STATE ENGINEER.

3321. State engineer—Appointment—Office—Salary—Oath—Bond.—Sec. 157. The governor shall appoint a state engineer, who shall hold his office for the term of two years, or until his successor shall be appointed and qualified. The governor may at any time, for cause shown, remove said state engineer. The said state engineer shall have his office at the state capitol, in suitable rooms to be provided for him by the secretary of state, who shall furnish him with suitable furniture, postage and such proper and necessary stationery, books and instruments as are required to best enable him to discharge the duties of his office. He shall be paid a salary of three thousand dollars per annum, payable monthly by the state treasurer, on warrants drawn by the state auditor. The said state engineer shall, before entering on the discharge of his duties, take and subscribe to an oath, before the judge of a state court of record, to faithfully perform the duties of his office, and file said oath with the secretary of state, together with his official bond, in the penal sum of ten thousand dollars, said bond to be signed by sureties approved by the secretary of state and conditioned upon the faithful discharge of the duties of his office and for delivering to his successor, or other officer authorized by the governor to receive the same, all moneys, books, instruments and other property belonging to the state then in his possession or under his control, or with which he may be legally chargeable as such state engineer. [L. '89, p. 371, § 1.

3322. General duties of state engineer.—Sec. 158. **The state engineer shall have general supervising control over the public waters of the state.** He shall make or cause to be made careful measurements of the flow of the public streams of the state from which water is diverted for any purpose, and compute the discharge of the same. He shall also collect all necessary data and information regarding the location, size, cost and capacity of dams and reservoirs hereafter to be constructed, and like data regarding the feasibility and economical construction of reservoirs on eligible sites, of which he may obtain information, and the useful purposes to which the water from the same may be put. He shall also collect all data and information regarding the snow-fall in the mountains each season, for the purpose of predicting the prob-

able flow of water in the streams of the state, and publish the same. [L. '89, p. 372, § 2.

[Duties appertaining to reservoirs. Sections 3205–3214.]

[Report of engineer on desert land projects. Section 5145.]

3323. Shall approve designs and plans.—Sec. 159. The state engineer **shall approve the designs and plans for the construction** and repair of all **dams or reservoir embankments** which are built within the state, which equal or exceed ten feet in vertical height. [L. '89, p. 372, § 3.

[Office of division superintendent abolished and division engineers provided in their place. Section 3335.]

3324. Supervision over division engineers and water commissioners.—Sec. 160. The **state engineer shall have general charge over the work of the division water superintendents and district water commissioners,** and shall furnish them with all the data and information necessary for the proper and intelligent discharge of the duties of their offices, and shall require them to report to him at suitable times their official actions, and require of them annual statements, on blanks to be furnished by him, of the amount of water diverted from the public streams in their respective divisions and districts, and such other statistics as, in the judgment of the state engineer, will be of benefit to the state. [L. '89, p. 374, § 4.

3325. Additional duties of engineer.—Sec. 161. The state engineer shall, without any extra pay or compensation beyond the salary provided in section one of this act, perform all duties imposed upon him by law, and shall when called upon by the governor, **give his counsel and services,** without extra pay or compensation, **to any state department or institution**; Provided, however, That he shall be allowed all actual traveling and other necessary expenses, and the actual cost of preparing necessary maps and drawings, which actual expenses shall be paid by the department or institution requiring his services. [L. '89, p. 373, § 6.

[3326–3328, incl., provide for the appointment of deputy state engineers and assistants.]

3329. Require owners of ditches to construct and maintain a measuring weir.—Sec. 165. For the more accurate and convenient measurement of any water appropriated pursuant to any judgment or decree rendered by any court establishing the claims of priority of any ditch, canal or reservoir, the owners thereof **may** be required by the state engineer to construct and maintain, under the supervision of the state engineer, a measuring weir or other device for measuring the flow of the water at the head of such ditch, canal or reservoir, or as near thereto as practicable. The state engineer shall compute, and arrange in tabular form, the amount of water that will pass such weir or measuring device at the different stages thereof, and he shall furnish a copy of a

statement thereof to any water superintendents or commissioners having control of such ditch, canal or reservoir. [L. '89, p. 374, § 9.

3330. Cubic foot per second, unit of measurement.—Sec. 166. The state engineer shall use in all his calculations, measurements, records and reports, the cubic foot per second as the unit of measurement of flowing water, and the cubic foot as the unit of measurement of volume. [L. '89, p. 374, § 10.

3331. Report of state engineer.—Sec. 167. **The state engineer shall prepare and render to the governor** a full and true report of his work, regarding all matters and duties devolving upon him by virtue of his office, which report shall be delivered at the time when the reports of other state officers are required by law to be made, in order that it may be laid before the general assembly at each regular session thereof. [L. '89, p. 374, § 11.

[3332–3334 provide for fees.]

Irrigation Divisions—Division Engineers.

3335. (As amended S. L. 1911, p. 469, 470.) The office of the superintendent of irrigation is hereby declared abolished, and in place of such superintendents the governor shall, subject to confirmation by the senate, appoint an **irrigation division engineer** for each irrigation division now existing or which may hereafter be created. Each person so appointed shall have been a resident of Colorado for at least five (5) years, and shall have been a resident of the division, over which he shall have jurisdiction, for at least two (2) years prior to his appointment, unless there shall have been no applicant who is qualified for appointment in said division, in which case any qualified resident of any other irrigation division may be appointed. One of said officers shall have jurisdiction over irrigation division No. 1, comprising all water districts now or hereafter to be formed, consisting of lands in the state of Colorado irrigated by water taken from the South Platte river, the North Platte river, the Big Laramie river, the North and Middle forks of the Republican river, Sandy and Frenchmans creeks, and the streams draining into the said rivers and creeks; one over irrigation division No. 2, * * * (setting forth by boundaries the several irrigation divisions conforming to the drainage areas). The secretary of state shall provide a suitable office for each division engineer and shall supply him with suitable furniture and office equipment for the proper transaction of the business and preservation of the records of the irrigation division. Such office and equipment shall be used exclusively for the conduct of business of the state of Colorado and for no private business of any character. The office shall be open during all ordinary business hours except when the duties of the division engineer require his absence, in which instance notice of his whereabouts shal be posted at said office.

[3337–3343, inclusive, provide for examinations, qualifications, term of office, etc., of division engineers.]

3344. (As amended S. L. 1911, p. 469, 472.) The **duties** of the **irrigation division engineer** shall be as follows: He shall be governed by all acts heretofore enacted relative to superintendents of irrigation and shall have general control over the water commissioners of the several districts within his division. **He shall,** under the general supervision of the state engineer, **execute the laws of the state relative to the distribution of water, in accordance with the right of priority of appropriation, as established by judicial decrees.**

He shall, in the distribution of water, be governed by the regulations of this act, and acts that are now in force, but for the better discharge of his duties, **he shall have the authority to make such other regulations to secure the equal and fair distribution of water,** in accordance with the rights of priority of appropriation, as may, in his judgment, be needed in his division; Provided, such regulations shall not be in violation of any part of this act, or other laws of the state, but shall be merely supplementary to and necessary to enforce the provisions of the general laws and amendments thereto.

Any person, ditch company, or ditch owner, who may deem himself injured or discriminated against by any such order or regulation of such irrigation division engineer shall have the right to **appeal** from the same **to the state engineer,** by filing with the state engineer a copy of the order or regulation complained of, and a statement of the manner in which the same injuriously affects the petitioner's interest. The state engineer shall, after due notice, hear whatever testimony may be brought forward by the petitioner, either orally or by way of affidavits, and through the irrigation division engineer shall have power to suspend, amend or confirm the order complained of.

He shall have the right to call out any water commissioner of any water district within his division, at any time he may deem it necessary, and he shall have the power to perform the regular duties of water commissioner in all districts within his division.

Each irrigation division engineer shall devote his entire time to the work of his office and in stream measurement, ditch and canal rating, examination of ditches and reservoirs, collection of information relating to the supply and use of water, proper preservation and indexing of data and records and any other duties which may be of him required by law or directed by the state engineer, or which will tend to facilitate and improve the distribution and use of water within his division. He shall require the water commissioners to make annual reports as required by law, on or before the 15th day of November of each year. All records and data collected by the division engineer shall be the property of the state of Colorado and shall be open to public examination

and use during all business hours, except when necessarily absent as in Section 1 of this act provided, and it shall be unlawful for any division engineer to engage in any other business or private engineering practice, and he shall not hold or perform the duties of any other office.

3346. (As amended S. L. 1911, p. 469, 473.) The **clerk of any court in this state** issuing judicial decrees fixing the priorities of appropriation of water for irrigation and other beneficial purposes in any of such divisions, **shall** within ten days after such decrees have been entered, **forward** by registered mail one certified **copy** of said decree **to the state engineer,** and one certified copy to the **irrigation division engineer** having jurisdiction over the water district in which said decree shall have been entered, as heretofore provided by law in the case of superintendents of irrigation. Immediately upon receipt of said certified copies of such decrees, both the state engineer and said division engineers shall promptly file and preserve the same among the official records in the office of each of said officials and such division and state engineers shall make a tabulated statement of such decrees, in uniform books to be prepared for such purpose by the state engineer.

3345. Charges against water commissioner—Trial—Suspension—Removal.—Sec. 181. Charges made against any water commissioner for malfeasance in office, neglect of duty, or incompetency to fulfill the duties incumbent upon him, shall be made to the division engineer in writing, setting forth the specific charges against him, who shall hold a fair and impartial trial, after five days' notice to such water commissioner, upon whom a written copy of the charges shall be served. At such trial such water commissioner shall be permitted to appear in person and by counsel, and introduce evidence. Should such water commissioner be found guilty of any of the offenses charged, then, and in that case only, the irrigation division engineer having jurisdiction is hereby empowered to suspend him. All such investigations shall be tried and determined within five days from the date set for trial, and at which trial all oral testimony shall be reduced to writing; Provided, That either party may take depositions anywhere in the state and may have them read at said trial by giving the opposite party twenty-four hours' notice of the time and place and names of the parties whose depositions will thus be taken.

Upon such suspension the division engineer shall, within ten days, file all pleadings, papers and testimony with the state engineer for review; whereupon the state engineer shall appoint a competent deputy to at once assume control of the district of the water commissioner so suspended. The said deputy shall retain such control until the disability of the commissioner is removed or a new commissioner is appointed and qualified, and the said deputy shall be paid for his services from the state engineer's assistants' fund. The state engineer shall review the action of the

division engineer as expeditiously as possible, and within thirty days from the time of receiving such papers, shall submit his findings to the governor for his action.

In case such suspension of any water commissioner be recommended to be made permanent by the state engineer in his findings, the governor shall, upon the recommendation of the board or boards of county commissioners, as provided by law, forthwith appoint some suitable and competent person to fill such vacancy.

The person or corporation making any such charges against any water commissioner shall furnish a good and responsible bond in such reasonable sum as may be fixed by the division engineer, conditioned for the payment of the reasonably necessary expenses incurred by the water commissioner in case the charges preferred against him are not sustained by the division engineer.

All division engineers shall be under the control and supervision of the state engineer, and may have charges preferred against them in the same manner, and such charges may be heard and determined by the state engineer upon the same conditions herein provided for like proceedings against the water commissioner. [L. '03, p. 285, § 10.

3347. Meetings of division engineers—Reports.—Sec. 183. There shall be held in the office of the state engineer in November of each year a meeting of the irrigation division engineers and of the state engineer and his chief assistant, at which meeting the reports of the irrigation division engineers shall be presented and a general discussion had of the matters which have transpired during the previous season, and at which a program of the work for the ensuing season shall be discussed and determined upon.

The reports filed with the state engineer shall include all correspondence for the season on all business and official acts for the season last past, and shall include the reports of the water commissioners, as hereinafter defined, and other data and information. [L. '03, p. 287, § 12.

3348. Report of water commissioners—Contents.—Sec. 184. It shall be the duty of each irrigation division engineer to prepare and tabulate the reports of the water commissioners in his division, which reports shall contain a statement of the actual carrying capacity and the amount of water actually carried by each ditch or canal in his district for each and every day when water was being so carried, the total number of acres lying under each ditch or canal and the number of acres actually irrigated therefrom. It shall also contain a statement of the kind of crops and the acreage under each decreed ditch or canal, the amount of water stored in each reservoir, the amount used therefrom, with the date of such storage and use, and the same shall be on blanks, or in books, prepared for that purpose and furnished by the state engineer. They shall contain a written statement of the official acts of the commissioners, and other matters of interest and use,

and shall be duly subscribed and sworn to and filed with the irrigation division engineer on or before the 15th day of November of each year. [L. '03, p. 287, § 13.

3349. Clerk furnish copies of decrees to division engineer. —Sec. 185. Within thirty days after his appointment, said superintendent of irrigation shall send to the clerk of the district court, within his division, of such counties as have had rendered by the district court of such county, judicial decrees, fixing the priorities of appropriation of water for irrigation purposes for any water district, a notification of his appointment to such office, and shall request of the said clerk a certified copy of every decree of the district court establishing priorities of appropriation of water used for irrigation purposes within that district. Thereupon, it shall be the duty of such clerk, within ten days after the receipt of such request from said superintendent of irrigation, to prepare a certified copy of all decrees of such district court establishing priorities of water rights made within that district, under the provisions of the general statutes of the state of Colorado, and transmit the same to the superintendent of irrigation requesting it. Said superintendent of irrigation shall then cause to be prepared a book to be entitled, "The Register of Priorities of Appropriations of Water Rights for Water Division No....., State of Colorado," within which he shall enter and preserve such certified copies of decrees. Said superintendent of irrigation shall, from such certified copies of decrees, make out a list of all the ditches, canals and reservoirs entitled to appropriations of water within his division, arranging and numbering the same in consecutive order, according to the dates of their respective appropriations within his division, and without regard to the number of such ditches, canals or reservoirs may bear within their respective water districts. Said superintendent of irrigation shall make from his register a tabulated statement of all the ditches, canals and reservoirs in his division whose priorities have been decreed, which statement shall contain the following information concerning each ditch, canal and reservoir arranged in separate columns. The name of the ditch, canal or reservoir; its number in his division; the district in which it is situated; the number of it in its proper district; and the number of cubic feet of water per second to which it is entitled, and such other and further information as he may deem useful to the proper discharge of his duty. In case any decrees of court establishing priorities of appropriation of water for irrigation purposes are made after the transmittal of the copy of previous decrees to the superintendent of irrigation, it shall be the duty of the clerk of the court wherein such decree is rendered, to transmit to the superintendent of irrigation of the division within which said county is situated, within ten days after it is rendered, a copy of such decree, and the superintendent of irrigation shall enter the same in his register, such register to

be filed and kept in the office of the state engineer. [L. '87, p. 297, § 7.

[Division engineers succeeded the superintendent of irrigation.]

3350. Commissioners report to engineers.—Sec. 186. All water commissioners shall make reports to the superintendent of irrigation of their division as often as may be deemed necessary by said superintendent. Said reports shall contain the following information: The amount of water necessary to supply all the ditches, canals and reservoirs of that district; the amount of water actually coming into the district to supply such ditches, canals and reservoirs; whether such supply is on the increase or decrease; what ditches, canals or reservoirs are at that time without their proper supply; the probability as to what the supply will be during the period before the next report will be required, and such other and further information as the superintendent of irrigation of that division may suggest. Said superintendent of irrigation shall carefully file and preserve such reports, and shall, from them, ascertain what ditches, canals and reservoirs are, and what are not, receiving their proper supply of water; and if it shall appear that in any district in that division any ditch, canal or reservoir is receiving water whose priority post-dates that of the ditch, canal or reservoir in another district, as ascertained from his register, he shall at once order such post-dated ditch, canal or reservoir shut down and the water given to the elder ditch, canal or reservoir. His orders being directed at all times to the enforcement of priority of appropriation, according to his tabulated statement of priorities, to the whole division, and without regard to the district within which the ditches, canals and reservoirs may be located. The reports of water commissioners by the superintendents of irrigation shall be filed and kept in the office of the state engineer. [L. '87, p. 298, § 9.]

[Division engineers succeeded the superintendent of irrigation.]

3351. Owner report failure to receive water—Duty of engineer.—Sec. 187. In case any ditch, canal or reservoir, in any district within such superintendent of irrigation's division, shall fail to receive its regular supply of water, the owner or controller of such ditch, canal or reservoir may report such fact to the water commissioner of that district, who shall immediately apportion the water in his district, and send forthwith by telegram, if necessary, a report of such fact to the superintendent of irrigation of his division, and thereupon it shall be the duty of said superintendent to compare such report with his register, and if any ditch, canal or reservoir of any other district of his division is receiving water to which any ditch, canal or reservoir of any other district is entitled, he shall at once order the shutting down of the post-dated ditches, canals or reservoirs, and the water given to the

ditches, canals or reservoirs having the priority of appropriation; Provided, however, That nothing in this act shall be construed as interfering with the priority of water for domestic use. [L. '87, p. 299, § 10.

[See note, Section 3350.]

VII. WATER DISTRICTS—WATER COMMISSIONERS.

A. Boundaries of Water Districts.

3353. Lands watered constitute districts.—Sec. 189. That the lands now irrigated, or which may be hereafter irrigated from ditches now taking water from the following described rivers or **natural streams of the state of Colorado,** are hereby declared to constitute irrigation districts. [G. S., §1741; L. '79, p. 97, §5.

(Sections 3354–3418 designate water districts Nos. 1 to 64 inclusive—not here involved.)

3419. District number sixty-five.—Sec. 255. That water district No. 65 shall consist of all lands in the state of Colorado irrigated by water taken from the middle and north forks of the Republican river, from Sandy and Frenchman's creeks, and the tributaries of these streams. [L. '89, p. 213, §15.

(Sections 3420–3426 refer to water districts 67-70—not here involved.)

B. Water Commissioner.

3427. Water commissioners—Appointment—Term of office—Bond.—Sec. 263. There shall be one water commissioner for each of the above named districts, and for each district hereafter formed, who shall be appointed by the governor, to be selected by him from persons recommended to him by the several boards of county commissioners of the counties into which water districts may extend; and the water commissioner so appointed, shall, before entering upon his duties, give a good and sufficient bond for the faithful discharge of his duties, with not less than three sureties, in a sum not less than one thousand nor more than five thousand dollars, the amount of said bond to be fixed by the county commissioners, and approved by the governor and state engineer. The commissioner so appointed shall hold his office until his successor is appointed and qualified; Provided, however, That if such water district shall be embraced in more than one county, and the several counties in which such water district is situated, disagree as to the amount of the bond as herein required of water commissioners, then and in that event the governor shall fix the amount thereof, with the same effect as though fixed by the county commissioners. [L. '87, p. 302, §1; amending G. S., §1752; L. '79, p. 98, §16.

(3428–29 provide for vacancies, oath of office, etc.)

3430. Commissioner begin work when called on.—Sec. 266. Said water commissioners shall not begin their work until they shall be called on by two or more owners or managers or persons controlling ditches in their several districts by application in writing stating that there is necessity for their action; and they shall not continue performing services after the necessity therefor shall cease. [G. S., §1758; L. '79, p. 107, §42.

[Penalty for failure of commissioner to act. Section 3258.]

3431. Commissioners to devote entire time—Neglect.—Sec. 267. It is hereby made the **duty of the water commissioner** after being called upon to distribute water, to devote his entire time to the discharge of his duties when such duties are required, so long as the necessities of irrigation in his district shall require; and it is made his duty to be actively employed on the line of the stream or streams in his water district, **supervising** and **directing** the putting in of head-gates, waste gates, keeping the stream clear of unnecessary dams or other obstructions, and such other duties as pertain to a **guard of the public streams** in his water district; and for wilful neglect of his duty, he shall be liable to fifty dollars fine, with costs of suit. [L. '89, p. 471, §6.

[Report of commissioners. Section 3348.]

3432. Duty of commissioners—Open and shut head-gates.—Sec. 268. It shall be the **duty** of said **water commissioners** to **divide** the **water** in the natural stream or streams of **their district** among the several ditches taking water from the same, according to the prior rights of each respectively; in whole or in part to shut and fasten, or cause to be shut and fastened, by order given to any sworn assistant, sheriff or constable of the county in which the head of such ditch is situated, the head-gates of any ditch or ditches heading in any of the natural streams of the district, which, in a time of a scarcity of water, shall not be entitled to water by reason of the priority of the rights of others below them on the same stream. [G. S., § 1754; L. '79, p. 99, § 18.

[When commissioner shall withdraw excess water from reservoir. Section 3208.]

3433. Powers of commissioner—Commissioner subordinate to state and division engineers.—Sec. 269. Water commissioners shall, in discharge of their duties, be invested with the powers of constables, and may arrest any person violating his orders relative to the opening or shutting down of head gates, or the using of water for irrigation purposes, and take such offender before the nearest justice of the peace, who may, if such offender be convicted, fine him in any sum not exceeding one hundred dollars, and, in default of the payment of such fine, may imprison him in the county jail not exceeding thirty days; Provided, That the orders of the superintendents of irrigation in their respective divisions, and the orders of the state engineer, shall be held at all times superior to the orders of water commissioners, and shall

relieve any person acting in accordance with such superior orders from the penalties herein provided; And provided, also, That in like manner the orders issued by the state engineer shall be held superior to any order issued by any superintendent of irrigation. [L. '89, p. 469, §1.

[Supervision of state engineer over commissioners. Section 3324.]

(Sec. 3434 concerns compensation of commissioner.)

3435. Deputy commissioner—Appointment — Salary. — Sec. 271. The water commissioner is hereby authorized to appoint not to exceed two deputies to speedily make the examinations provided for in section one of this act, who shall be entitled to the same compensation, and to be paid in the same manner as is by law provided for the payment of other deputy water commissioners. [L. '95, p. 197, §2.

[Section 1 above referred to is Section 3438.]

3438. Commissioner inspect ditches—Waste of water.—Sec. 274. The water commissioners of the several water districts of this state are hereby empowered, and it is hereby made their duty, upon the application of the owners of one or more ditches in their district, to immediately make, or cause to be made, a thorough examination of all ditches within their district for the purpose of ascertaining what use is being made by the owners of or consumers of water from said ditches; and if at any time he shall ascertain that the owner or owners of any ditch drawing water from the natural streams furnishing water to his district shall be permitting any of the waters flowing in such ditch to go to waste, or to be wastefully, or extravagantly or wrongfully, used by its water consumers, or put to any other use than that to which it is entitled to be used in the order of priority, at such times as the same is being needed by other appropriators, it shall be the duty of such water commissioners to immediately shut off the supply of water in such ditch to such an extent as in his judgment was wasted, or extravagantly, wastefully or wrongfully used. [L. '95, p. 197, §1.

3439. Failure of commissioner to perform duties—Penalty. —Sec. 275. Any water commissioner who fails to perform any of the duties imposed upon him by this act shall be deemed guilty of a misdemeanor, and, upon conviction thereof by a court of competent jurisdiction, shall be fined in a sum not less than fifty (50) dollars nor more than five hundred (500) dollars. [L. '95, p. 198, §3.

PART V.

NEBRASKA STATUTES.

ACT OF 1889, Laws of Nebr., 1889, Chap. 68, p. 503:

"An Act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes and to repeal sections one hundred and fifty-eight (158) and one hundred and fifty-nine (159) of chapter sixteen (16) of the Compiled Statutes of 1887, entitled 'Corporations.'

Be it enacted by the Legislature of the State of Nebraska:

Article I.—Water Rights.

Section 1. The right of the use of running water, flowing in a river or stream or down a canyon, or ravine, may be acquired by appropriation by any person or persons, company or corporation organized under the laws of the state of Nebraska; Provided, That in all streams not more than fifty feet in width, the rights of the riparian proprietors are not affected by the provisions of this act.

Sec. 2. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.

Sec. 3. No tract of land shall be crossed by more than one ditch, canal or lateral without the written consent and agreement of the owner thereof, if the first ditch, canal or lateral can be made to answer the purpose for which the second is desired or intended.

Sec. 4. All ditches, canals or laterals used for the purpose of irrigation shall be exempt from all taxation, whether for state, county or municipal purposes.

Sec. 5. The person, company or corporation entitled to the use may change the place of diversion if others are not injured by such change and may extend the ditch, flume or aqueduct by which the diversion is made to places beyond that where the first use was made.

Sec. 6. The water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated.

Sec. 7. As between the appropriators the one first in time is first in right."

Secs. 8–15, inclusive, provide for posting of a notice of claim at the point of diversion and record thereof.

The first nine sections of Article 2 of the act provide for rights of way; Section 10 requires ditches to be kept in repair;

Section 11 protects vested rights; Section 12 requires that in case the volume of water in any stream is not sufficient to continue a supply of the wants for irrigation purposes of the owners of lands in any neighborhood, the waters diverted must be held to be a common right; Section 13 provides the order in which water shall be delivered to the consumers; Section 14 provides against excessive use, and Section 15 provides the penalty for interference with the ditch.

(Note—The foregoing was the law of Nebraska when complainant's canal was constructed. It will be noted that Section 1 of the act limits the right of the use of running water to corporations organized under the laws of the state of Nebraska. Complainant claims title under an appropriation alleged to have been made by a Colorado corporation.)

ACT OF 1895, Laws of Nebr., 1895, Chap. 69, p. 244:

In 1895 the legislature of Nebraska first enacted a statute providing for adjudicating and determining "the priorities of right to the use of the public waters of the state." The sections governing the adjudication proceeding under which complainant asserts it obtained its so-called Nebraska decree are as follows:

Sec. 4. There is hereby created a state board of irrigation composed of the governor, attorney general and the commissioner of public lands and buildings.

Sec. 16. It shall be the duty of the state board at its first meeting to make proper arrangements for beginning **the determination of the priorities of right to use the public waters of the state,** which determination shall begin on streams most used for irrigation, and be continued as rapidly as practicable until all the claims for appropriation now on record shall have been adjudicated. The method of determining the priority and amount of appropriation shall be determined by the said state board, which at its first meeting shall designate the streams to be first adjudicated.

Sec. 18. All appropriations for water must be for some beneficial or useful purpose, and when the appropriator of his successor in interest ceases to use it for such purpose the right ceases.

Sec. 20. Each appropriation shall be determined in its priority and amount, by the time at which it shall have been made, and the amount of water which the works are constructed to carry; Provided, That such appropriator shall at no time be entitled to the use of more than he can beneficially use for the purposes for which the appropriation may have been made, and the amount of any appropriation made by means of enlargement of the distributing works heretofore shall be determined in like manner; Provided, That no allotment for irrigation shall exceed one cubic foot per second for each 70 acres of land for which said appropriation shall be made.

Sec. 21. Within thirty days after the determination of the priorities of appropriation to the use of water of any stream, it shall be the duty of the state board, through its secretary, to issue to each person, association or corporation, a certificate to be signed by the president of the state board and attested by the secretary of said board, setting forth the name and postoffice address of the appropriator, the priority number each of appropriation, the amount of water appropriated and the amount of prior appropriation and if such appropriation be for irrigation, a description of the land to which the water is to be applied and the amount thereof. Said certificate shall be transmitted by the said state board of irrigation through its secretary, by registered mail to the county clerk of the county in which said appropriation shall have been made, and it shall be the duty of said county clerk within ten days after the receipt of said certificate to record the same in a book especially prepared and kept for that purpose, and to notify the party, or parties, in whose favor the said certificate is issued of such record, and transmit said certificate to said party, or parties, on payment of the fees for recording, which fee shall not exceed seventy-five cents for each certificate so recorded.

(Note—The jurisdiction of the state board of Nebraska is limited to adjudication of rights to "public waters of the state" of Nebraska. It had no jurisdiction over waters in Colorado, and any decree entered for control of diversions in Colorado was void for want of jurisdiction. See Lamson v. Vailes, 27 Colo. 201; Turley v. Furman, 16 New Mexico 253.)

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IN THE

Supreme Court of the United States

[redacted]3

No. [redacted]-October Term, 1918

ADELBERT A. WEILAND, AS STATE ENGINEER OF THE STATE OF COLORADO, ET AL., APPELLANTS,

VS.

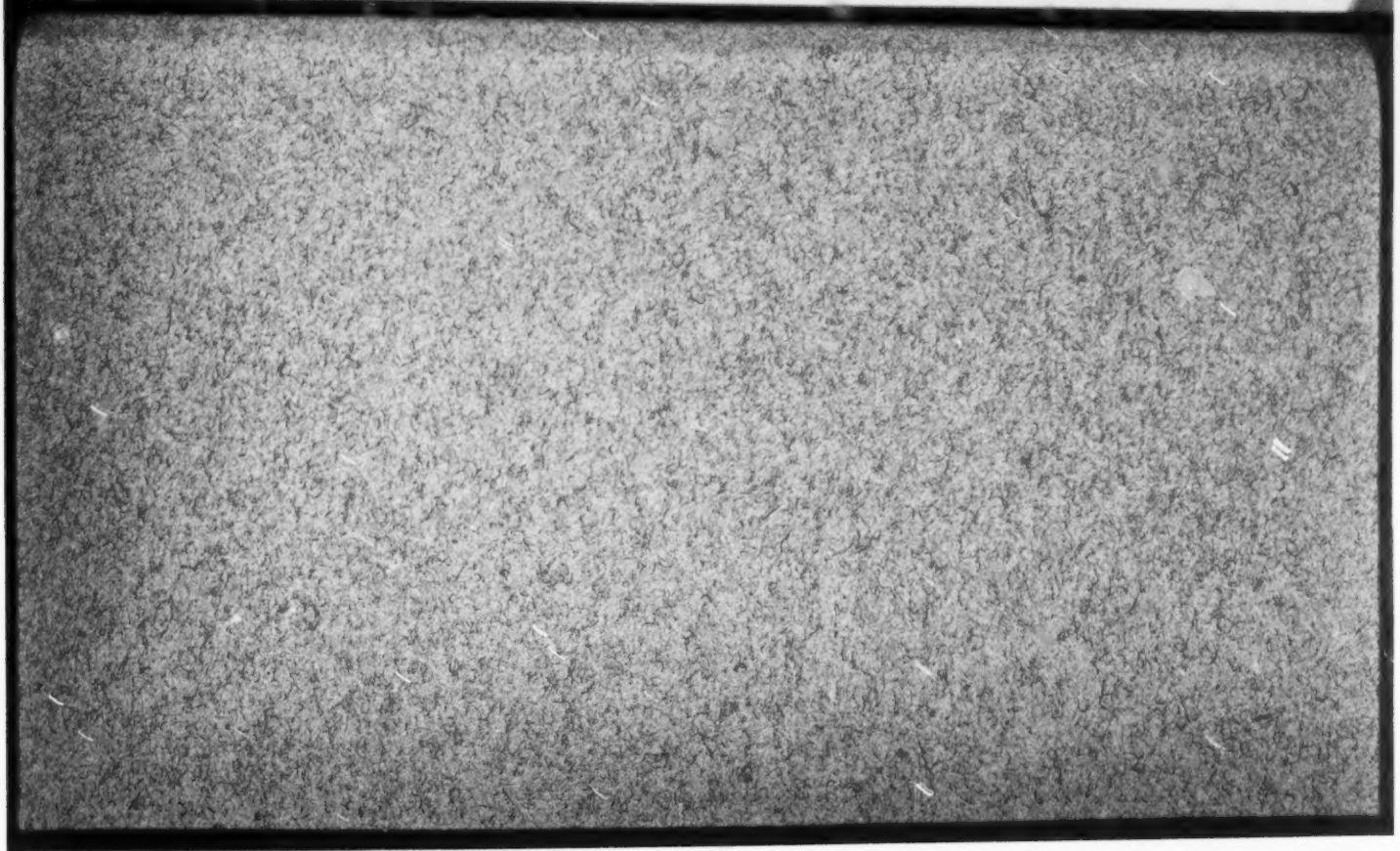
THE PIONEER IRRIGATION COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEE

EDWIN H. PARK,
Solicitor for Appellee.

W. F. ROBINSON PTG. CO., DENVER



INDEX OF SUBJECTS.

	Page
Statement of Case	1
Argument	5
Motion to Dismiss or Affirm	5
Errors Here Assigned Not Presented to Court of Appeals	10
Jurisdiction	11
Police Power	13
Appellant Officials Are Only Called Upon to Obey the Law Not to Violate It	17
Colorado Legislation	24
Neither the Constitution Nor Laws of Colorado Limit Place of Use to Lands Within the State	32
Source of Title	33
The Common Law	34
The Louisiana Purchase	35
Admission of Colorado	36
The Claim of State Ownership by Colorado Is Inconsistent With the Right to Acquire Title by Prescription	42
Title Cannot Be Vested By Mere Fiat of Law	42
Title in the United States	44
Act of Congress, July 26, 1866	52
That the United States Not Only Owned the Land, but the Beneficial Use of the Water, Is recognized by all Western States Including Colorado	58
The Right of a State With Respect to Riparian Rights	78
Rights on An Interstate Stream	80
Other Contentions of Appellants	94
Conclusion	98

INDEX OF CASES.

Page

Alamosa vs. Nelson, 42 Colo., 140 ..... 12, 15, 18
Allen vs. Swadley, 46 Colo., 544 18
Anderson vs. Bassman, 140 Fed., 14 83
Arbuckle vs. Blackburn, 191 U. S., 405 8
Armstrong vs. Larimer Co. Ditch Co., 1 Colo. App., 49 63
Arnett vs. Linhart, 21 Colo., 188, 190 51
Atchison vs. Peterson, 20 Wall., 510 54
B. & O. Ry. vs. Baugh, 149 U. S., 368 40
Bagnell vs. Broderick, 13 Pet., 436 43
Barkley vs. Tieleke, 2 Mont., 59 56
Basey vs. Gallagher, 20 Wall., 670 73
Bean vs. Morris, 159 Fed., 651 87
Bean vs. Morris, 221 U. S., 485 ..... 19, 88, 98
Beaver Brook Co. vs. St. Vrain Co., 6 Colo. App., 130 73
Belk vs. Meagher, 104 U. S., 279, 283 53
Benton vs. Johncox, 17 Wash., 277, 283 ..... 35, 41
Bessemer Co. vs. Wooley, 32 Colo., 437 51
Broad Run Co. vs. Duel, 47 Colo., 573 14
Broder vs. Water Co., 101 U. S., 274 ..... 54, 63, 73
Burley vs. U. S., 179 Fed., 1 76
Cary Mfg. Co. vs. Acme Flexible Clasp Co., 187 U. S., 427, 428 9
Clark vs. Allaman, 71 Kans., 206 35
Clark vs. Ashley, 34 Colo., 285, 289 18
City of Denver vs. Clements, 3 Colo., 472, 480 26
Cline vs. Stock, 71 Neb., 70 97
Coffin vs. Left Hand Ditch Co., 6 Colo., 443 ..... 32, 59, 96
Combs vs. Farmers, 38 Colo., 420, 428 14
Comstock vs. Ramsey, 55 Colo., 244 24
Conant vs. Deep Creek & C. V. Irr. Co., 23 Utah, 627 91
Coosaw M. C. vs. State, 144 U. S., 550, 562 41
Cottonwood D. Co. vs. Thom, 39 Mont., 115 56
Coyle vs. Smith, 221 U. S., 559, 568 40
Crawford Co. vs. Needle Rock Co., 50 Colo., 176, 182 18
Crippen-Lawrence Inv. Co. vs. Burroughs, 27 Colo., 155 16
Cruse vs. McCauley, 96 Fed., 369 82
Davis vs. Randall, 44 Colo., 488 51
Devine vs. Los Angeles, 202 U. S., 313 95
Dorr vs. Hammond, 7 Colo., 79, 83 18

Page

Drach vs. Isola, 48 Colo., 134, 145.....18
Empire State Mg. Co. vs. Hanley, 198 U. S., 292..... 7
Empire W. & T. Co. vs. Cascade T. Co., 205 Fed., 123.....79
Elder vs. Wood, 208 U. S., 226, 232.....53
Enterprise Irr. District vs. Canal Co., 92 Neb., 121.....97
Eubank vs. Richmond, 226 U. S., 137, 143.....15
Ex parte Webb, 225 U. S., 663.....40
Ex parte Young, 209 U. S., 123.....20, 22
Garfield vs. Goldsby, 211 U. S., 249, 261.....19
Gibbons vs. Ogden, 9 Wheat., 1, 211.....15
Gibson vs. Chouteau, 13 Wall., 92.....43, 75
Green vs. Willhite, 160 Fed., 775.....57
Green vs. Louisville and Interurban R. R. Co., 244 U. S., 499, 506.....20
Green Valley Ditch Co. vs. Franz, 54 Colo., 226, 232.....18
Georgia vs. Tenn. Copper Co., 206 U. S., 230, 237.....93
Gutierres vs. Albuquerque, 188 U. S., 545.....57
Hartman vs. Tresise, 36 Colo., 146.....63, 75
Hoge vs. Eaton, 135 Fed., 411.....83
Hough vs. Porter, 51 Ore., 318.....72
Howell vs. Johnson, 89 Fed., 556.....80
Hudson Water Co. vs. McCarter, 209 U. S., 349.....93
Hull vs. Burr, 234 U. S., 712, 720..... 7
Hawkins vs. Bleakly, 243 U. S., 210.....95
Illinois Central R. R. Co. vs. Green, 244 U. S., 555, 559....20
Ind. Ditch Co. vs. Agr. Ditch Co., 22 Colo., 513.....14, 17, 23
Ins. Co. vs. Childs, 25 Colo., 360.....51
Ironstone Ditch Co. vs. Ashenfelter, 57 Colo., 31.....51
Irvine vs. Marshall, 20 How., 558.....43, 44, 69, 78
Jacobson vs. Mass., 197 U. S., 11, 25.....15
Jennison vs. Kirk, 98 U. S., 453.....53
Johnson vs. McIntosh, 8 Wheat., 543.....44
Jones vs. Conn., 39 Ore., 30.....35
Kansas-Colorado Case, 206 U. S., 46.....24, 48, 50, 75
Kirk vs. State Board, 90 Neb., 627.....97
Langdon vs. Sherwood, 124 U. S., 74, 84.....43
Lankford vs. Platte Iron Works Co., 235 U. S., 461.....17
Larimer Co. R. Co. vs. People, 8 Colo., 614, 618.....16, 61
Larimer & Weld D. Co. vs. Ft. Collins M. and E. Co., 60 Colo., 241.....18

Page
Leadville vs. Coronado Mg. Co., 37 Colo., 234, 240.....26
Lamson vs. Vailes, 27 Colo., 201.....93
Light vs. U. S., 220 U. S., 523.....37, 49
Louisville & N. R. R. Co. vs. Green, 244 U. S., 522, 528....20
Lampasas vs. Bell, 180 U. S., 276, 282..... 7
Lux vs. Haggin, 69 Calif., 255, 311.....41
Magruder vs. Belle Fourche V. W. U. Ass'n, 219 Fed., 72..20
McCarter vs. Hudson Water Co., 70 N. J. Eq., 695, 707....35
McKinlay vs. Wheeler, 130 U. S., 630, 632.....28
Miller & Lux vs. Rickey, 152 Fed., 11.....86
Mohl vs. Lamar Canal Co., 128 Fed., 776.....60, 77
Monte Vista Co. vs. Centennial D. Co., 22 Colo. App., 364, 370 .....56, 67
Morgan vs. Shaw, 47 Ore., 333, 337.....56
Morris vs. Bean, 146 Fed., 423.....23, 84
Nevada Ditch Co. vs. Bennett, 30 Ore., 59.....73
New Mercer D. Co. vs. Armstrong, 21 Colo., 57.....15
Nichols vs. McIntosh, 19 Colo., 22, 27.....51
Norton vs. Whiteside, 239 U. S., 144.....6, 95
Omaha Electric Light & Power Co. vs. City of Omaha, 230 U. S., 123 8
O'Neil vs. Northern Colo. Irr. Co., 242 U. S., 20.....95
Oppenlander vs. Ditch Co., 18 Colo., 142, 148.....35
Oregon R. R. Co. vs. Oregon Ry. Co., 130 U. S., 1, 26.....41
Packer vs. People, 8 Colo., 361, 364-5.....40
Paige vs. Peters, 70 Wis., 182.....43
Park vs. Park, 45 Colo., 347, 356.....18
Perkins Co. vs. Graff, 114 Fed., 441.....32, 89
Peyton vs. Desmond, 129 Fed., 1, 10.....42
Philadelphia Co. vs. Stimpson, 223; U. S., 605, 619, 620....19
Platte Water Co. vs. No. Colo. Irr. Co., 12 Colo., 525. 531, 532 .....34, 62
Reagan vs. Farmers' Loan & Trust Co., 154 U. S., 362....22
Reynolds vs. People, 1 Colo., 179.....58
Rickey Land & Cattle Co. vs. Miller & Lux, 218 U. S., 258..89
Roberson vs. People, 40 Colo., 119, 124-5.....13
Rossmiller vs. State, 114 Wis., 169, 179.....43
Schilling vs. Rominger, 4 Colo., 100.....59
Smith vs. Deniff, 24 Mont., 20, 21.....56
Snyder vs. Colo. Gold Dredging Co., 181 Fed., 62.....56, 78
State vs. Wagener, 77 Minn., 483, 494.....15

Page
Sternberger vs. Seton, 45 Colo., 401.....67
Stockman vs. Leddy, 55 Colo., 24, 29.....41
Story vs. Woolverton, 31 Mont., 346.....72
Strickler vs. Colo. Sprgs., 16 Colo., 61.....51
Taylor vs. Hulett, 15 Idaho, 265.....91
Thomas vs. Guiraud, 6 Colo., 530, 532.....32
Title Co. vs. Guarantee Co., 174 Fed., 385, 387.....41
Union M. & M. Co. vs. Ferris, 2 Saw., 176.....56, 67, 73
United States vs. Conrad Inv. Co., 156 Fed., 123.....73
United States vs. Cook, 19 Wall., 591, 592.....44
United States vs. Four Bottles of Sour Mash Whiskey, 90 Fed., 720, 22.....45
United States vs. D. & R. G., 150 U. S., 1, 14.....41
United States vs. Morrison, 203 Fed., 364.....77
United States vs. Oregon Co., 186 Fed., 861.....41
United States vs. Rio Grande Irr. Co., 174 U. S., 690.....16, 41, 43, 46, 47, 77, 78
United States vs. Utah Power Co., 209 Fed., 554, 560.....40
Van Sickle vs. Haines, 7 Nev., 249.....70
Wadsworth vs. Boysen, 148 Fed., 771.....22
Western Union Tel. Co. vs. Ann Arbor R. R. Co., 178 U. S., 239, 243 7
Weyman-Bruton Co. vs. Ladd, 231 Fed., 898.....22
White vs. Highline Canal Co., 22 Colo., 191.....14
White vs. Nuckols, 49 Colo., 175, 176.....18
Wilcox vs. Jackson, 13 Peters, 498.....40, 48
Wilcox vs. McConnell, 13 Pet., 498, 516.....43
Willey vs. Decker, 11 Wyo., 496.....89
Winters vs. United States, 207 U. S., 564.....45, 57
Wood vs. Etiwanda W. Co., 122 Calif., 152.....56
Wyatt vs. Larimer & Weld Irr. Co., 1 Colo. App., 480.....60
Wyatt vs. Irrigation Co., 18 Colo., 298, 307.....51
Yunker vs. Nichols, 1 Colo., 551.....26, 50, 59

STATUTES AND TEXT BOOKS.

Page

2 Blackstone's Com., 17, 18....35
Code Napoleon, Art. 644....36
Coke on Littleton, 4 A....35
Colorado Enabling Act, Sec. 4....37
Colorado Organic Act, Sec. 6....36
Constitution of Colorado, Secs. 5, 6, Art. 16....25
Federal Constitution, Par. 2, Sec. 3, Art. 4....44, 50
General Laws, 1877, Secs. 192, 274....29
General Statutes 1883, Secs. 238, 308....30
Election Ordinance....37
1 Kinney on Irr. and Water Rights (2nd Ed.), Sec. 388, page 657....42
2 Kinney Irr. and Water Rights, 640, 1124....74
Laws of Colorado, 1877....29
1 Mills' Ann. Stat., 110 (1891)....39
Mills' Statutes 1912, Secs. 980, 1092....30
Nebraska Stat....97
Proclamation of President....38
Rev. Stat. Colo., 1868....28, 31
Rev. Stat. 1908, Sec. 992....31
Rec. Stat. 1908, Secs. 847, 988....30
Rev. Stat. Colo., 1908, Secs. 3322, 3324, 3325....12
Rec. Stat. Colo., 1908, Sec. 3344....13
Territorial Laws, 1862....27
Territorial Laws, 1864....27, 30
Territorial Laws, 1865....28
Territorial Laws, 1876....29
Treaty of France, 1803, Art. 1, Art. IV....36
2 Washburn's Real Property, 366, 367 (5th Ed.)....34
3 Washburn's R. P., 4 (5th Ed.)....34
Weil on Water Rights, 3rd Ed., 807, 812, 815, 818, 819....35
Wiel on Water Rights, 3rd Ed., 180....35, 56
Yale, Mining & Water Rights, page 380....56

IN THE

Supreme Court of the United States

No. 147—October Term, 1918

ADELBERT A. WEILAND, AS STATE ENGINEER OF THE STATE OF COLORADO, ET AL., APPELLANTS,

VS.

THE PIONEER IRRIGATION COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEE

STATEMENT OF THE CASE.

This case arises over the rights of private individuals to divert water for irrigation from an interstate stream arising in Colorado and flowing into Nebraska. Neither State is a party to this action.

The rights of neither State are involved, but the questions are confined solely to the rights and interests of private parties.

The question involved in this case is whether or not a private party having made a valid appropriation of water in accordance with the Act of Congress of 1866 (14 Stat., 251, 253, Sec. 2339, Rev. Stat., 1878), and having also complied with all the local laws of both States, can lawfully conduct the water so appropriated across the State line of Colorado into Nebraska for the irrigation of lands therein.

The original appropriation was made by a Colorado corporation who operated it for twenty years, then sold it to appellee, a Nebraska corporation. So the water rights appropriated became vested in, and for twenty years were owned by, a Colorado corporation created by and existing under Colorado laws, and during all of that period diverted water

from the stream in Colorado, irrigated about 1,000 acres in Colorado, and 2,000 acres in Nebraska. (Exhibit "A", Record, page 43.)

The appellee did not initiate this right by original appropriation, but acquired it by purchase after it had ripened into an incontestable vested right by both appropriation and prescription in the hands of a domestic corporation.

Both States recognize the necessity of irrigation for the successful growing of agricultural crops, and long prior to the initiation of the rights of appellee had enacted legislation in recognition of the right of appropriation of water for irrigation, prescribing the manner of appropriation and regulating the use, both States basing their laws upon the fundamental principle that first in time is prior in right. Neither in the legislation nor constitutional provisions of either State can there be found a prohibition against the appropriation of water for irrigation of lands outside of the State. The appellee, a Nebraska corporation, is the owner of an irrigation ditch commonly called the Haigler Canal, with its headgate in Colorado and diverting water from the north fork of the Republican River, a natural stream arising in Colorado. The ditch is about fifteen and one-half miles in length, about seven (7) miles of which is in the State of Colorado, and the appellee diverting such waters distributes it, and it is used in irrigating lands both in Colorado and in Nebraska. In July, 1912, a decree was entered by the District Court of Phillips County, State of Colorado, which Court had jurisdiction to enter such decree, fixing the priorities and amount of water which all ditches within the water district, and taking water from the Republican River, were entitled to. The appellee in such proceeding was granted priority No. 6 for fifteen (15) cubic feet of water per second of time. (Record, pages 2, 3.)

The District Court of Phillips County held that it had no jurisdiction to adjudicate to the appellee company any water or priority for water to be delivered to consumers in the State of Nebraska, and so stated in its decree, and further provided therein that the decree should in no manner effect any right, claim or interest of the appellee to divert water for irrigation in either Nebraska or Kansas. (Record, page 4.)

The appellee then proceeded under the laws of Nebraska to have its right adjudicated under the laws of that State, which resulted in a decree in its favor before the State Board of Irrigation, Highways and Drainage, within whose jurisdiction such matters are vested by the laws of Nebraska. (Record, page 5.)

These statutory decrees, however, confer no new rights, but their purpose is to embody in the form of permanent binding decrees the evidence of pre-existing rights.

Thereafter the State Engineer, the Division Superintendent and Water Commissioner of Colorado refused to recognize appellees' rights to divert water in its ditch for beneficial use in Nebraska, and thereupon the appellee brought suit to restrain such officers from interfering with its right to divert at its headgate in Colorado a sufficient quantity of water to properly irrigate the lands lying under its ditch in the State of Nebraska, and made parties thereto all water users within the State of Colorado taking water from the stream or its tributaries.

The Bill not only alleges diversity of citizenship and that the amount involved exceeded the sum of Three Thousand Dollars ($3,000.00), but that the suit was brought to obtain redress for the deprivation by defendants under color of the laws and statutes of Colorado, of rights and privileges secured to the appellee by the Constitution and laws of the United States providing equal rights of citizens of the United States, and particularly the right of the appellee to carry on commerce between the State of Colorado and the State of Nebraska, and to divert water in the State of Colorado, and to transport, carry and sell the same to citizens within the State of Nebraska for agricultural purposes. (Record, page 5.)

The Bill further alleges that the value of its ditch and water rights within the State of Nebraska is $150,000.00. That the appellee has, without molestation, continuously and uninterruptedly for more than twenty years diverted and transported such waters to Nebraska where the same have been used, and farmers depending upon such waters for irrigation have erected extensive and valuable improvements, claiming thereby a prescriptive right. That by the acts of the appellants, rights secured to the appellee by the Constitution and Laws of the United States have been invaded and disregarded to its injury. (Record, page 6.)

Motions were filed by the appellants contending that the suit was essentially against the State of Colorado because the State of Colorado was the owner of the waters. That the State Engineer and other state officers joined as parties were simply enforcing the laws of the State. These motions were overruled and answers filed which put the appellee to proof of the allegations of its Bill, together with a "further defense" that the appellee was bound by the adjudication decree of the District Court of Phillips County. A second "further defense" that Colorado was the owner of all of the water, and therefore the State was a necessary party. A third "further defense" that the State of Nebraska obtains an equitable proportion of the water of the stream, and a fourth "further defense" that the return flow was sufficient for all the needs and purposes of the appellee. (Record, pages 9-14.)

The trial resulted in favor of the appellee for twenty-nine (29) cubic feet of water per second of time, to be measured at a measuring box in the ditch at the state line, for use in Nebraska.

The trial court expressly found as follows:

> "I will also find that this complainant, or the land owners using water under the ditch of the complainant, situate in Nebraska, used and applied to beneficial purposes since the construction of the ditch (April, 1890), the capacity of the ditch whenever they could receive it, and it was not denied to them by those in Colorado who controlled the intake, in the irrigation of the lands, without waste and for useful and beneficial purposes. They are entitled to that amount as their appropriations measured by what flows through the measuring weir at the state line to the capacity of the ditch at the point fixed at 29 second feet, and that their priority is the same and of the same date as that fixed by the State Court in the water adjudication wherein it was determined the users under that ditch in Colorado were entitled to priority No. 6." (Record, page 25.)

The decree followed expressly that finding, so that in the determination of the case in the trial court the right was determined in favor of the appellee as a prescriptive right, and not upon any question of State ownership or State rights.

In the Court of Appeals the question of jurisdiction was determined adversely to the appellants, and no other question was determined by that Court, for the reason, as stated by the Court:

> "That the decree rendered by the court below is erroneous in whole or in part, assuming that the court had jurisdiction—and we decide that it had—is neither assigned as error or argued in brief by counsel for appellants. The decree appealed from, therefore, must be affirmed, and it is so ordered." (Record, pages 56-57.)

ARGUMENT.

MOTION TO DISMISS OR AFFIRM.

At the threshold of this argument I desire to again call the Court's attention to the motion interposed by the appellee to either dismiss or affirm this case, on the following grounds:

First. That an appeal will not lie to review the decision of the Court of Appeals, as the record discloses that while the jurisdiction of the trial court was invoked upon the dual grounds of diversity of citizenship and constitutional questions, the case was disposed of by both the trial court and the Court of Appeals upon other and different grounds. In other words, the question of the constitutional right of appellee to divert water in Colorado for the irrigation of lands in Nebraska was not passed upon by either court, but the case disposed of on the ground that the appellee had acquired a prescriptive right to the use of water.

Second. That this Court is without jurisdiction because the constitutional grounds alleged in the bill of complaint were not considered by either the trial court or the Court of Appeals in the determination of the cause. Nor did the ultimate determination of this cause depend upon any constitutional ground or federal question.

Third. That the appellants having elected to appeal to the Circuit Court of Appeals, and the cause having there been affirmed, an appeal will not lie to this Court.

The appellants raised questions of jurisdiction of the trial court by motion and by answer, contending that this was a suit against the State of Colorado, and also that there was not such diversity of citizenship as required by the statute. Those questions were resolved against the appellants by both the trial court (Record, page 8), and by the Court of Appeals (Record, page 54.) Those questions, however, are not the constitutional or the federal questions which except a case from the provisions of Section 128 of the Judicial Code and permit an appeal to this Court.

First. Our contention is that, notwithstanding the bill of complaint invoked the jurisdiction of a Federal court upon the dual grounds of diversity of citizenship and constitutional questions, yet both courts having disposed of the case without a consideration of constitutional or Federal questions, but disposed of the case solely and alone upon questions of substantive law and evidential facts, the case must now be viewed as one in which the jurisdiction of the Court was invoked solely and alone upon the ground of diversity of citizenship.

In other words, to be appealable, the final judgment must be the result of, be based and depend upon, the construction and application of some Federal law to the facts involved, and

if some Federal law is not so construed and applied and the judgment rendered is not the result of such construction and application, an appeal will not lie from a Circuit Court of Appeals to this Court, where the only other jurisdictional ground is that of diversity of citizenship, notwithstanding jurisdiction may have been originally invoked upon both grounds.

In the case of *Norton, Ex'cr. vs. Whiteside*, 239 U. S., 144, the jurisdiction of the trial court was invoked both upon the ground of diversity of citizenship and "that the cause of action was one arising under the constitution and laws of the United States."

Of this the Court said, speaking through Chief Justice White, at page 147:

> "This, however, does not suffice to solve the question, since it is settled that a mere formal statement to that effect is not enough to establish that the suit arises under the Constitution and laws of the United States, but that it must appear that 'it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, *upon the determination of which the result depends.*'" (Italics ours.)

In the case at bar the question of the right of the appellee to divert water in Colorado for irrigation of lands in the State of Nebraska was the question to be determined, and for the purpose of bringing the question before the Court in all its aspects it was first alleged that the appellee had a right under the Constitution and laws of the United States to so divert and carry the water, notwithstanding the contention of the State of Colorado as to its exclusive right of ownership and control of such waters. That in addition to being protected in such right under the Federal laws, the appellee also alleged that it had a vested right in such water and to continue to carry and deliver the same in Nebraska because it had for more than twenty years without hindrance or molestation so diverted, and carried the same, and put to beneficial use in Nebraska the given quantity of water.

In deciding the case the trial court laid aside the contention raised by the issues under the Federal law and based its decision entirely upon the fact that the evidence disclosed a vested right in the appellee because of the use of such water for a period of more than twenty years. In other words, the Court protected the right which had become vested by such use, and did not determine, nor pass upon, the question of

ownership either under the laws and Constitution of Colorado, or the rights asserted under the Federal Constitution and laws. The Court of Appeals affirmed the case because these questions were neither assigned as error nor argued in the briefs. (Record, pages 56, 57.)

That being the case, it was not necessary for either Court to determine, nor did they determine, any question of constitutional or Federal law, nor did the result of the case depend thereon. For that reason we contend that the case comes squarely within the rule laid down by this Court in *Norton vs. Whiteside, supra,* where an appeal was dismissed under similar allegations contained in the bill.

In the case of *Hull vs. Burr,* 234 U. S., 712, 720, the Court in defining when a suit is one arising under the laws of the United States, speaking through Mr. Justice Pitney, said:

> "The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States upon the determination of which the result depends."

In *Western Union Telegraph Co. vs. Ann Arbor Railroad Co.,* 178 U. S., 239, 243, the Court, speaking through the late Chief Justice Fuller, said, at page 243:

> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States *upon the determination of which the result depends,* it is not a suit arising under the constitution or laws." (Italics ours.)

Like language is quoted with approval by this Court in *Lampasas vs. Bell,* 180 U. S., 276, 282.

In *Empire State Mining Co. vs. Hanley,* 198 U. S., 292, in an appeal from the Circuit Court of Appeals of the Ninth Circuit, where the jurisdiction of the Court was invoked, not only upon the ground of diversity of citizenship, but also, it was contended, upon Federal questions, Chief Justice Fuller again said, speaking for the Court, at page 298:

> *"The decisions of the courts below did not turn on any federal questions."* (Italics ours.)

And as the case was decided upon questions of fact and substantive law, this Court dismissed the appeal.

Another case quite similar to the one at bar is that of the *Omaha Electric Light and Power Co. vs. City of Omaha,* 230 U. S., 123, where the company alleged in its bill of complaint, not only a diversity of citizenship, but that the City of Omaha threatened, by its acts, to invade rights secured to it by its franchise, and thus violate rights secured to it by federal law. Like the case at bar the relief sought was a perpetual injunction restraining such threatened acts. The Court there held that the bill did not allege sufficient facts to show the case to be one arising under the constitution, or that the plaintiff was asserting any right, privilege or immunity under the constitution, or in any wise invoking its protection, while the bill in the case at bar goes further and does claim protection under the constitution and laws of the United States. Yet the relief sought was granted not upon such contention, but upon the securing of vested rights by long continued user. The result is the same as in the Omaha case, where Mr. Justice Van Devanter said, page 125:

> "For anything that appeared the plaintiff was planting its right to relief entirely upon the doctrine of estoppel. As a basis of jurisdiction, it is not enough that recovery might be sought upon a constitutional ground, for it must clearly appear that it is actually so sought. Crowell vs. Randell, 10 Pet., 368, 392. Hanford vs. Davies, 163 U. S., 273, 280."

We therefore contend that, notwithstanding we sought recovery in this cause upon constitutional grounds, yet it not being the basis of the decision nor involved therein so far as the determination of this cause was concerned, diversity of citizenship was the only ground upon which jurisdiction was invoked, and thus, as said by Mr. Justice Van Devanter in the above case, at page 126:

> "It being thus apparent that diverse citizenship was the sole ground upon which the jurisdiction of the Circuit Court was invoked, it follows that the decision of the Circuit Court of Appeals was final."

Again, in *Arbuckle vs. Blackburn,* 191 U. S., 405, jurisdiction of the Federal court was likewise sought upon the ground of diversity of citizenship and federal law, and it was contended, in support of the appeal from the Circuit Court of Appeals of the Sixth Circuit, that the case did not rest wholly upon diversity of citizenship, but that it was one arising under the constitution of the United States, the Court

held, page 413, that the case did not really and substantially involve a dispute or controversy as to the effect or construction of the constitution, and that the result of the case did not depend thereon, the appeal was dismissed. That case is an authority here, because, notwithstanding our controversy could have been disposed of upon the constitutional grounds, yet, as the Court did not so dispose of it, but did dispose of it on other grounds, the constitutional question was not so involved as to permit an appeal to this Court; and because of such fact the decision of the Court of Appeals was and is final.

Other decisions might be cited, but we deem these sufficient to demonstrate that, notwithstanding jurisdiction of a Federal court is invoked upon the grounds of diversity of citizenship and also upon constitutional questions, yet where a case is determined solely and alone upon other grounds and an appeal has been taken by the losing party to the Court of Appeals and is there affirmed, such decision of the Court of Appeals is final, and no appeal will lie to this Court, *because the construction of the Federal constitution or Federal law was not involved in the decision and was not determinative of any issue in the case,* notwithstanding, the case could have been disposed of upon such issue. In the case at bar the case having been disposed of independent of any such question and solely upon the evidence and substantive law, the decision of the Court of Appeals is final and this appeal should be dismissed.

Third. The question of the jurisdiction, to-wit, that the State was being sued instead of its officers, was a question injected into the case by the appellants, and an adverse decision upon that question would have enabled them, under Section 238 of the judicial code, to have taken an appeal direct to this Court. Having gone to the Court of Appeals, they must abide its decision. As said in *Cary Mfg. Co. vs. Acme Flexible Clasp Co.,* 187 U. S., 427, 428:

> "Although it is insisted that the judgment imposing the fine was a final judgment in the criminal matter, it is argued that it involved the denial of constitutional rights and hence that this Court has jurisdiction under Section 5 of that act; but it is settled that even if a party might be entitled to come directly to this Court under that section, yet if he does not do so and carries his case to the Court of Appeals, he must abide by the judgment of that court. Robinson vs. Caldwell, 165 U. S., 359; American Sugar Refining Co. vs. New Orleans, 181 U. S., 277; Huguley Mfg. Co. vs. Galleton Cotton Mills, 184 U. S., 290; Ayres vs. Polsdorfer, 585 Post."

No contention can be successfully made that this case does not fall within the rules of appeal thus laid down by this Court, and we respectfully submit that the appeal should either be dismissed or the judgment of the Court of Appeals affirmed.

ERRORS HERE ASSIGNED NOT PRESENTED TO THE COURT OF APPEALS.

It is axiomatic, from a long line of decisions in this Court, that questions not raised or presented in the Court below will not be entertained, considered or ruled upon in this Court.

Counsel, in lieu of specification of errors required by the rules of this Court, have re-printed in their brief the assignment of errors *in extenso*.

The first eight relate wholly to the jurisdiction of the trial court, raising only questions which were presented to the Court of Appeals and there determined. The questions of jurisdiction thus raised bring the case within the provisions of Sec. 128 of the Judicial Code, which would permit an appeal from the trial court direct to this Court, but are not the constitutional questions which permit an appeal from the Court of Appeals to this Court. Those questions of jurisdiction were determined by the Court of Appeals, and it was held that the trial court had jurisdiction, for the reason that "the suit is not one to compel the State officers to act in violation of the laws of the State of Colorado, or to control the performance of their general duties, but is a suit which seeks to compel said officers to cease violating what is claimed to be the law of Colorado and the rights to which the plaintiff claims it is entitled". (Record, page 54.)

The Court of Appeals then stated at considerable length the contention of the appellee and the finding of the Court upon those contentions. With respect to the final decree as rendered in the trial court, the Court of Appeals said:

> "That the decree rendered by the court below is erroneous in whole or in part, assuming the court had jurisdiction and we decide that it had, is neither assigned as error nor argued in brief by counsel for appellants. The decree appealed from, therefore, must be affirmed." (Record, pages 56-7.)

The record thus discloses that no question was presented by the appellants by assignment of error or argument, other than the mere question of jurisdiction of the trial court. The

various questions thus raised in this Court, not having been before the Court of Appeals, they will not be considered by this Court.

They are not, therefore, entitled to have those questions re-tried in this Court, and cannot present to this Court any other questions, in any event, because they were not presented to the Court of Appeals.

JURISDICTION.

The basis of the appellant's argument is that the State of Colorado is the owner of all the waters within its territorial borders, and therefore an attempt to interfere with the methods of distribution adopted by Colorado is an interference with its sovereignty and its property rights. As will be hereafter shown, this assertion by the State of Colorado is untenable.

The position of the appellee is that the State of Colorado does not own the water, that the object of this suit is to compel the performance of a plain legal duty by the appellant officials, which they have neglected to perform, that this duty is not judicial, legislative nor discretionary, but simply ministerial, to-wit: To simply compel ditches which hold priority senior to that of the appellee to comply with the laws of Colorado and not divert more water than they can put to beneficial use, and to compel the junior ditches to shut down their headgates and allow the appropriation of the appellee to be filled, and to recognize the right of the appellee under its priority to continue to divert water to the State of Nebraska, as it has done constantly and continuously ever since the construction of the ditch in 1890. That all the appropriated waters flowing in the State of Colorado are owned by the appropriator, and that the appellee, having in due time and in lawful manner complied with the laws of both Colorado and Nebraska, and the Federal Statutes and over twenty years adverse user, is vested with an incontestable right and title to continue to divert from the Republican River the same quantity as it has in the past. That the place of the application of the water to beneficial use cannot effect the right thereto; that the Federal law granting that right is not so limited; that the sole duty of the Colorado officers is a police duty and nothing more.

As the powers and duties of the appellant officials are entirely statutory it is necessary to consider such statutes.

Until 1879 there had never been any general legislative rule regulating the diversion of water for agricultural purposes from the public streams of the State. The State was being rapidly settled by farmers and the waters of the natural

streams were being more and more called upon to aid in agriculture, so that many of the streams during the irrigation season had become practically dry, by reason of the diversion of all their waters to beneficial uses. Up to that time there was no method of ascertaining the relation of priorities one to another other than the undefined claim of the individual appropriator or ditch company and as the Supreme Court of Colorado has well said, the very nature of the business "led to unseemly breaches of the peace and to avoid these it was found expedient and necessary to provide complete rules of procedure covering the use of water from the public streams of the State".

The legislature of that year (amended in 1881 and 1887) enacted a complete set of laws defining the manner of appropriation and the use of water, the duties of owners and manner of fixing rates of charge therefore, a complete form of procedure for the adjudication of water rights, vesting in the District Courts jurisdiction to hear all questions relative to, and determine the dates of, priority of all ditches within their districts together with the amount of water to which the owner was entitled under his priority. The act also divided the State into irrigation divisions, each division into districts.

Under this statute suits were brought in the various irrigation districts and the priorities of appropriators in the district established. As said by the Supreme Court of Colorado in *The Alamosa Creek Canal Company vs. Nelson,* 42 Colo., 140, 147.

> "The statutory decree confers no new rights, but, as this court has repeatedly held, embodies in the form of a permanent, binding decree the evidence of pre-existing rights."

The statute provides for a State Engineer, division engineers and water commissioners.

As defined by statute, the State Engineer shall have general supervising control over the public waters of the State, shall measure the public streams, collect data relative to irrigation works and approve designs and plans for their construction, and shall have general charge over the work of the division engineers and water commissioners furnishing them with necessary data for the proper discharge of their duties.

> Revised Statutes, Colo., 1908, Secs. 3322, 3324, 3325.

The division engineer's duties are that he shall have general control over the water commissioners of the several dis-

tricts within his division and under the general supervision of the State Engineer, he shall

> "execute the laws of the State relative to the distribution of water, in accordance with the right of priority of appropriation, as established by judicial decrees. * * * * He shall have the authority to make such other regulations to secure the equal and fair distribution of water, in accordance with the rights of priority of appropriation, as may, in his judgment, be needed in his division; provided, such regulations shall not be in violation of any part of this act, or other laws of the State, but shall be merely supplementary to and necessary to enforce the provisions of the general laws and amendments thereto."

Revised Statutes Colo., 1908, Sec. 3344.

The duty of the water commissioner is simply to regulate the headgates of ditches within his District in accordance with the decreed priorities and to execute the general orders of his division engineer.

Thus it is that under the statutes of Colorado, the official appellants in this case are no more or less than police officers of the state with well defined duties which are neither legislative, judicial nor discretionary.

Police Power.

The constitutionality of the foregoing code of irrigation laws has been upheld by the Colorado courts as an exercise of the police power of the State.

Properly construed, and a study of the Colorado Statutes will disclose, that every statute passed by the Legislature of Colorado regarding irrigation which constitutes and forms the basis of the Colorado contention, is a state police control over the use and distribution of water the title of which was originally derived from the United States, not by the State of Colorado, vested by actual appropriation in private citizens as recognized by the acts of Congress of 1866, and the local laws of Colorado.

As said in *Roberson vs. People,* 40 Colo., 119, 124-5:

> "This Court has repeatedly upheld the irrigation law of this state as being the exercise of *police power* of the state."

In *Combs vs. Farmers etc. Co.*, 38 Colo., 420, 428, it is said:

> "The statutes are in the nature of police regulations to secure the orderly distribution of water for irrigation purposes, and to this end to provide a system of procedure for determining the priorities of rights as between carriers."

To same effect, *Broad Run Co. vs. Duel*, 47 Colo., 573-9.

In *White vs. Highline Canal Co.*, 22 Colo., 191, 197, the Court said:

> "*From the very nature of the business, controversies with reference to the use of water naturally led to unseeming breaches of the peace, and to avoid these it was found expedient and necessary to provide complete rules of procedure governing the taking of water from the public streams of the state, and regulating its distribution to those entitled thereto.* AUTHORITY FOR SUCH REGULATIONS MAY PROPERLY BE BASED UPON THE PRINCIPLE THAT WHEN PRIVATE PROPERTY IS '*affected by a public interest it ceases to be juris privati only.*'
>
> "That a canal used for the carriage of water for hire in this state is affected by a public interest has been recognized by the repeated decisions of this court." (Italics ours.)

The right to exercise police power over the matter of irrigation is not here based upon the ground of ownership by the state, but solely upon the ground of avoiding "unseeming breaches of the peace." *If the right was based on state ownership it was the opportune time to say so and put forward the claim.*

In *Ind. Ditch Co. vs. Agr. Ditch Co.*, 22 Colo., 513, 526, it is held that the superintendent who under the legislative act of 1887 had complete charge of the distribution of the water was invested with no judicial power, that the power conferred by the statute was executive and not judicial. It was to ascertain from the Court decrees the priorities and to keep a record of the same, and to take care that each and every ditch received its quota of water, and at page 528 held that these duties came fairly within the police power of the state as defined in *White vs. Highline Canal Co., supra.* The duties of the superintendent under the act of 1887 are the acts which under the present law are to be performed by the State Engi-

neer. The duties are the same in every particular. No greater nor less in the one than the other.

The adjudication of priorities in Colorado confers no new rights. It is but evidence of a pre-existing right.

> Alamosa vs. Nelson, 42 Colo., 140, 147.
> New Mercer D. Co. vs. Armstrong, 21 Colo., 57, 61.

The exercise of the police power of a state does not confer ownership in the state over the subject matter. Police power means "simply the power to impose such restrictions upon private rights as are practically necessary for the general welfare of all."

> State vs. Wagenen, 77 Minn., 483, 494.

Further, the police power of the state, though in the exercise of rights not controverted, must yield, if in conflict, to rights protected by Federal law.

> Gibbons vs. Ogden, 9 Wheat., 1, 211.

Expressed in other language, no State Constitution or legislative enactment in the exercise of police power can infringe any right granted or secured by the Federal constitution.

> Jacobson vs. Mass., 197 U. S., 11, 25.

> "Governmental power must be flexible and adaptive."
>
> Eubank vs. Richmond, 226 U. S., 137, 143.

Thus the police power of Colorado, exercised in regulating the orderly distribution of waters *within its borders*, are not violative of, or in conflict with, the Federal law, until some one vested with a right secured or protected by Federal laws, claims the protection of those laws, then the police power of Colorado must yield to the higher law. In other words, the Colorado law must be flexible and adaptive to the situation. Because the jurisdiction of Colorado ends at the state line is no reason for saying to the adjoining Nebraska farmer, whose needs of irrigation are as imperative as his next door neighbor in Colorado, "You cannot use the water because Colorado law does not permit it; you are beyond our jurisdiction. Your

needs may be as great as those of our citizens, and although you cannot be supplied with water from any other source, these waters are within the borders of Colorado, subject to its police powers, and therefore Colorado must and shall govern your situation and you cannot divert water in Colorado to irrigate and mature your crops over the line in Nebraska."

Regarding police rules of the state respecting the use of water, Mr. Justice Brewer said, *U. S. vs. Rio Grande Co.*, 174 U. S., 690, 704, 706:

> "*So far as these rules have only a local significance, and affect only questions between citizens of the state,* nothing is presented which calls for any consideration by the Federal Courts. * * *
>
> "Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. * * * And in reference to all these cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law rule, which permitted the appropriation of those waters for legitimate industries."

The Supreme Court of Colorado held that the Hardscrabble Creek Act of the Territorial Legislature, granting water in Hardscrabble Creek, was ineffective without actual use, *Crippen Lawrence Inv. Co. vs. Burroughs*, 27 Colo., 155. And in *Larimer County R. Co. vs. People*, 8 Colo., 614, 618, that the State Legislature cannot prohibit the appropriation of water from a stream in Colorado.

The Court said:

> "*While the Legislature cannot prohibit the appropriation or diversion of unappropriated water, for useful purposes,* from natural streams upon the public domain, *that body has the power to regulate the manner of effecting such appropriation or diversion. It may by reasonable and constitutional legislation designate how the water shall be turned from the stream, or how it shall be stored and preserved.*"

This opinion was written nine years after the State Constitution was adopted. Nothing more or greater can be claimed for the constitutional and statutory provisions than a police ordinance, and no claim was made for state owner-

ship until recent years, when the water became valuable and neighboring states began clamoring for their quota of it. If Colorado owned the water the Legislature would have full power to dispose of it.

Appellant Officials Are Only Called Upon to Obey the Law Not To Violate It.

Appellants contend that the decision of the Supreme Court of the United States in *Lankford vs. Platte Iron Works Company,* 235 U. S., 461, is decisive of the case at bar. There the owner of a certificate of deposit of a defunct bank brought suit against the banking commission of Oklahoma, claiming a right to have such certificate of deposit paid out of the "Depositors' Guarantee Fund," created under the laws of Oklahoma. That fund was made up of commissions required by the law to be paid by all banks operating under the state law in Oklahoma. The statute provided that the fund so created should be the property of the state. The commission was not only empowered to liquidate the deposits of failed banks, but to levy assessments on other banks to make up the deficiency. The state caused the fund to be created and to be administered by its officers rather than by judicial tribunals. Furthermore, the Supreme Court of Oklahoma had construed the law and held that the fund was under the management of the state, and that the Guaranty Fund was a fund of the state. That the title of the Fund was in the state.

In the case at bar an entirely different situation exists. As shown herein, all legislation of Colorado respecting irrigation is founded upon and sustained by the courts of Colorado as a police regulation. Notwithstanding counsel claim (page 180, their brief) that the respondent State officials exercised discretionary and *quasi* judicial powers; such is not their duty.

To repeat, in the case of *Independent Ditch Co. vs. Agricultural Ditch Co., supra,* it was held that these State officers, under the irrigation statutes of Colorado, while they have complete charge of the distribution of water, are invested with no judicial power, and their authority is purely executive. It is their duty to ascertain from the court decrees the relative priorities, keep a record of the same, and to take care that each and every ditch receives its quota of water, and these duties come fairly within the police power of the State.

It is not the contention of the appellee, nor has it ever been in this litigation, to require of the State officials a violation of any of the laws of the State of Colorado. It is our contention, and the record bears us out, that the only object sought is to require the State officials to cease violating the law.

It is contended by the appellants that because the right to irrigate Nebraska lands was not recognized in the Colorado decree, we are compelling State officials to violate the Colorado decree. The right to divert water for lands outside of the State was not, it is true, adjudicated in the Colorado decision (but expressly excepted therefrom; Record, page 104), but both the trial court and the Court of Appeals affirmed the claim of the appellee to this water, on the ground of prescription, appellee having used the water for more than twenty years without objection or hinderance from Colorado or the water users in that State.

Colorado has always recognized that the open and notorious use of water, such as that alleged and proven in the case at bar, gives title and requires its recognition by the State officers in the distribution of water, notwithstanding the adjudication decrees of the district to the contrary.

Dorr vs. Hammond, 7 Colo., 79, 83.
Clark vs. Ashley, 34 Colo., 285, 289.
Alamosa Co. vs. Nelson, 42 Colo., 140, 147.
Park vs. Park, 45 Colo., 347, 356.
Allen vs. Swadley, 46 Colo., 544.
Drach vs. Isola, 48 Colo., 134, 145.
White vs. Nuckols, 49 Colo., 175, 176.
Crawford Co. vs. Needle Rock Co., 50 Colo., 176, 182.
Green Valley Ditch Co. vs. Franz, 54 Colo., 226, 232.

This phase of the case was again determined adversely to the contention of the appellants by the Supreme Court of Colorado in the case of *Larimer & Weld R. Co. vs. Ft. Collins Milling & E. Co.*, 60 Colo., 241, where the Milling Company had, for a long series of years, used the water for power purposes, but at the date of the adjudication of the water decree in that district no decree was obtained for the use of the water for milling purposes. The plaintiff in error brought suit against the Milling Company and the State officials, to-wit, the officers who are parties appellant in this case, to enjoin the Milling Company from the use of the water, and to require the official defendants to police the river in the distribution of the waters in accordance with the adjudication decree for irrigation purposes, contending that it was the duty of the officials to regulate the use of the water in exact accordance with the decree of adjudication; but the Supreme Court of Colorado said (page 248) that, notwithstanding the Irrigation Acts of 1879 and 1881, of Colorado, are restricted to irrigation, it did not follow that there could not arise a right to the use of water by prescription, and that such right should

be recognized by the officials of Colorado, to whom was delegated the duty of distribution of the water. The Court said·

> "It cannot be said that one diverting and using water for a long period, acquired no vested right because the beneficial use was for power instead of irrigation, for which no decree could be entered under the Irrigation Acts prior to the Act of 1903. If it is true these Irrigation Acts do not include appropriations for other than irrigation purposes, it cannot be urged that they curtail the exercise of the right for power, merely because it is not evidenced by the decree. But it is said an Act was passed in 1903 (S. L. 1903, page 297) by which the power canal can obtain a decree, and it has not done so. If no decree for the power canal could be obtained under the Irrigation Acts,then from their passage down to the Act of 1903, the Water Commissioner would not be justified in interfering with the vested power right, merely because it was not evidenced by a decree."

It was further held that the failure in the Irrigation Acts to recognize the use of water for power purposes did not authorize the Water Commissioner or Engineer to refuse to recognize the right.

The same reasoning, and the same rule of procedure, and the same rights, apply to the appellee in the case at bar—having acquired by long use a prescriptive right to the use of water for beneficial purposes in the State of Nebraska, the fact that its right was not recognized by the decree of the Colorado courts in the adjudication of priorities in that Water District, does not require, on the part of State officials, a violation of any laws of Colorado in requiring them to permit the continued use of the water in the State of Nebraska.

Therefore, the right to maintain this suit falls directly within the rule laid down by this Court in *Phila. Co. vs. Stimpson*, 223 U. S., 605, 619, 620, and *Garfield vs. Goldsby*, 211 U. S., 249, 261, and numerous other cases that might be cited.

The litigation arising between Wyoming and Montana as disclosed in the case of *Bean vs. Morris*, which came to this Court and is reported in 221 U. S., 485, we contend is conclusive upon the appellants in this case, as the Court said at page 487:

> "But with regard to such rights as came into question in the older States, we believe that it always was assumed, in the absence of legislation to the contrary, that the States were willing to ignore bounda-

> ries and allow the same rights to be acquired from outside the State that could be acquired from within."

That case arose from the use of water of an interstate stream. Neither State had enacted any legislation prohibiting such use of the water, and like the case at bar, neither the State of Colorado nor the State of Nebraska had any legislation, directly or indirectly, prohibiting the acquisition of rights of the character contended for in the case at bar, until Colorado enacted, in 1917, an Act seeking to prohibit the acquiring of any rights to water for use outside of that State, but on the contrary, as hereafter shown, has directly recognized it.

The right to maintain an action against State officials is always sustained where the official is acting under an unconstitutional law or in violation of existing laws. This principle is settled by this Court in the following cases:

> *Exparte* Young, 209 U. S., 123.
> Green vs. Louisville & Interurban R. R. Co., 244 U. S., 499, 506.
> Louisville & Nashville R. R. Co. vs. Green, 244 U. S., 522, 528.
> Illinois Central R. R. Co. vs. Green, 244 U. S., 555, 559.

In *Magruder vs. Belle Fourche Valley Water Users' Ass'n*, 219 Fed., 72, the situation of the parties was almost identical to those in the case at bar. That case involved a Federal reclamation undertaking. The government officials, after completing the project, made certain rules and regulations for the government thereof, and for the distribution of the water. The water consumers organized a defendant association for the purpose of taking action. Objection was made to certain maintenance charges which the officers were seeking to collect, and other matters, and refused to pay, and thereupon their headgates were shut down and an action was brought for redress. It was there contended that it was a suit against the United States, and the Court was without jurisdiction.

Judge Sanborn, who wrote the opinion of the Court, said, at page 78:

> "It is the function and duty of the officers of the judicial department of the United States, a function and duty which they may not renounce, to exercise their own independent judgments in the determination of the questions whether or not acts of executive

officers are authorized by law, even though such officers have already decided the questions. (Citing cases.) * * *

"Another objection to the complaint is that it evidences a cause of action against the United States. This contention is presented in numerous forms, such as that the defendants are the officers of the United States and their acts are the acts of the United States, that an injunction against their acts would constitute an interference with the use and possession of the property of the United States, the water of its reservoir, and would compel specific performance of its contracts. If the acts of the defendants done and threatened were authorized by law they might be the acts of the United States against which a court of equity would grant no relief. But if the averments of the complaint are true, and in deciding the question now under consideration they must be assumed to be so, these acts are unauthorized by and contrary to law. They are, therefore, not the acts of the United States, and a suit to enjoin their performance is not a suit against the United States or a suit to interfere with its property, or a suit to compel specific performance of its contracts. It is a suit to enjoin officers of the United States from unlawfully interfering with and diverting its water from those persons lawfully receiving and entitled to receive it, from unlawfully preventing the United States from discharging its duties and performing its contracts, to the irreparable injury of the plaintiff and its shareholders. That an executive officer is committing or about to commit acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is a good cause of action against such officer for injunctive relief. A suit against him for such a cause is neither a suit against the United States nor is it, or the injunction against such acts of the officer, objectionable either on the ground that it interferes with the property of the United States, or its possession, or compels the specific performance of its contract by the latter. *American School of Magnetic Healing vs. McAnnulty*, 187 U. S., 94, 110, 111; *Philadelphia Co. vs. Stimson*, 223 U. S., 605, 619, 620; *Garfield vs. Goldsby*, 211 U. S., 249, 261; *Pennoyer vs. McConnaughy*, 140 U. S., 10, 12, 17; *Baker vs. Swigart* (D. C.), 196 Fed., 569, 571; *Id.*, 199 Fed., 865, 866; 118 C. C. A., 313; *Swigart vs. Baker*, 229 U. S., 187, 192; *United States vs. Cantrall* (C. C.), 176 Fed., 949, 954.

In a later case, *Weyman-Bruton Co. vs. Ladd,* 231 Fed., 898, where an action was brought to enjoin a state chemist from interfering and prohibiting the sale of goods in the State of North Dakota, the Court said, at page 901:

> "Whatever might have been the rule at an earlier date, it is now beyond question that, if the acts of an officer are beyond the authority vested in him by law, an action against him for trespass, in an action at law, or to enjoin him in equity, is within the jurisdiction of the national courts, if there is the proper diversity of citizenship, and the amount involved exceeds $3,000, both of which appear from the face of the complaint in the instant case. *Ex parte Young,* 209 U. S., 123; *Western Union Tel. Co. vs. Andrews,* 216 U. S., 165; *Harrison vs. St. Louis & San Francisco R. Co.,* 232 U. S., 318."

The matter is also clearly and concisely stated in *Wadsworth vs. Boysen,* 148 Fed., 771, 778, to be that if the officer is acting without warrant of law the suit is not against the state. In other words, as put by this Court, in *Reagan vs. Farmers' Loan & Trust Co.,* 154 U. S., 362, 389:

> "Where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a *mandamus,* in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the state."

This Court, in *Ex parte Young,* 209 U. S., 123, makes an exhaustive review of the decisions relating to the question of whether or not a state is sued in its sovereign capacity when its officers are made parties to a suit. The case grew out of the Minnesota rate litigation, and was a proceeding in *habeas corpus* on behalf of the Attorney-General of Minnesota, who had, notwithstanding the injunction of the Federal Court, proceeded to enforce the Minnesota law respecting railroad rates.

Beginning at page 149, the Court proceeds to review the cases on both sides of the question. The conclusion of the Court is stated on page 159:

> "The answer to all this is the same as made in every case where an official claims to be acting under the authority of the state. The act to be enforced is alleged to be unconstitutional, and if it be so, the use

> of the name of the state to enforce an unconstitutional act to the injury of complainants, is a proceeding without the authority of and one which does not affect the state in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting, by the use of the name of the state, to enforce a legislative enactment which is void because unconstitutional."

This is clearly applicable to the case at bar, because if the state does not own the water, but it is the property of the private citizen by appropriation or prescription, and the right of the state is limited solely to its police power, then the state is attempting to act and enforce rights which it does not possess. And, therefore, it is not affected in its governmental or sovereign capacity.

In support of the theory of the appellants they have cited in addition to the *Lankford* case, the various statutes of Colorado, a number of cases decided by the Supreme Court of the State, and various definitions of a public officer, as well as numerous decisions of the Supreme Court upon the liability of a State to be sued. This argument and citation of cases is based upon a false premise, to-wit: That the State of Colorado is the owner of the water.

The discussion of the subject as to whether or not a state is sued under like circumstances as those existing in the case at bar is found in the case of *Morris vs. Bean*, 146 Fed., 423, 429, and is set forth at large later in this brief. That case came to this Court and is reported in 221 U. S., 485, where the jurisdiction of the Court was upheld.

A like discussion of the jurisdiction of the Court and the question of whether or not the state is sued will be found in the opinion of Circuit Judge Morrow of the Ninth Circuit, in *Anderson vs. Bassman*, 140 Fed., 14.

The Colorado Reports are full of cases where these officers of the state have been sued, and the right to sue them as such officers has always been upheld. An illustration of this is found in *Ind. Ditch Co. vs. Agr. Ditch Co.*, 22 Colo., 513, 529.

The Court of Appeals and the trial court rightly held:

> "The suit is not one to compel the State officers to act in violation of the laws of Colorado or to control the performance of their general duties, but is a suit which compels said officers to cease violating what is claimed to be the law of Colorado and the rights to which the plaintiff claims it is entitled." (Record, page 54.)

The facts in this case and the rights of appellee not only under the Federal law, but under the laws of Colorado as well, entitled it to maintain its action in a Federal Court. It was not a suit against the State, but is a suit seeking redress for a private wrong against officials of the State who are intent on violating both the law of Colorado and the United States.

In Colorado the owner of a completed appropriation of water from a natural stream is entitled to have the conditions substantially maintained upon the stream as they existed when the appropriations were made. This has been decided so many times in Colorado that it now has become a rule of property in that State.

Comstock vs. Ramsey, 55 Colo., 244, 257.

But if Colorado did own the *unappropriated* waters, yet the record in this case shows that the normal flow of the stream at our headgate is 45 cubic feet per second. (Record, page 21.) That there has been appropriated from the stream, exclusive of the Pioneer Ditch, 66½ cubic feet (Record, page 3), so that in any event there was no water left to which the Colorado title could attach, and this suit then is solely between private persons, and we seek to require the official appellants to perform the duty required of them by the Colorado statutes, to-wit: distribute the water according to the rights of the respective parties, whether evidenced by an adjudicated decree or a prescriptive right.

This question will be further discussed in connection with the title to water.

Colorado Legislation.

The history of Colorado legislation discloses a public policy dictated by the Territorial Assembly and State Legislature directly contrary to the present-day claim of water ownership in the state. From the first statutory enactment there has always been recognized the universal need of irrigation and the Statutes were framed so as to permit the use of water wherever needed, regardless of natural obstacles or artificial state lines.

It was not until the suit of Kansas vs. Colorado (185 U. S., 124; 206 U. S., 46), that the State of Colorado adopted the unfounded claim of State ownership of all unappropriated waters in natural streams within the State. The rights claimed by the defendant in error accrued to it prior to any such claim by the State of Colorado.

The claim of Colorado rests upon Section 5 of Article XVI, of its Constitution, which is as follows:

> "The water of every natural stream, not heretofore appropriated within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided."

Section 6 of the same Article, reads as follows:

> "The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

We call especial attention to the first sentence of Section 6:

> *"The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied."*

The Colorado Constitution thus provides that there never shall be any restriction upon any person or corporation to appropriate waters of its streams for beneficial uses. Any citizen of the United States wherever resident has an equal right with the citizens of Colorado to appropriate the waters of its streams.

The words: "dedicated to the use of the people of the State, subject to appropriation as hereinafter provided," do not constitute a grant of Colorado waters to the use of the people of the State, but a grant only to such people of the State as shall, by appropriation of such waters to beneficial use, acquire a property right therein. There is no dedication or grant until there has been such appropriation, and there is nothing to indicate that inchoate rights are preserved to the people of the State until such appropriation is made by them.

In other words, the Constitution is a statutory dedication, so far as Colorado is able to make one, and no rights are ac-

quired thereunder until Section 6 of the Article is complied with. Thus, as held by the Supreme Court of Colorado:

> "A statutory dedication operates by way of grant. The law surrounds the act of dedication with all the formalities and solemnities necessary to the creation of the grant. * * * Without a substantial compliance with the statute * * * the estate would not pass * * *."
>
> City of Denver vs. Clements, 3 Colo., 472, 480.
> Leadville vs. Coronado Mining Co., 37 Colo., 234, 240.

The above sections of the Constitution are but a recognition of the doctrine of water appropriations as they existed in the arid states before its adoption, and cannot be construed as a reservation to the people of the State of Colorado. It is no more than a recognition of the right granted to the residents of the arid regions by the Congressional Act of 1866, wherein all persons complying with the local rules and customs became entitled to divert from the natural streams water to be used either in mining, agriculture, manufacturing or other beneficial and useful purposes.

As stated by Judge Hallett in the case of *Yunker vs. Nichols*, 1 Colo., 551-554:

> "All the lands in this territory which are now held by individuals were derived from the general government, and it is fair to presume that the government intended to convey to the citizens the necessary means to make them fruitful."

This language was used in 1872.

As a further recognition of the general rights of irrigation and that this right has never at any time in Colorado been limited to the residents of the State nor limited to its use to the lands within the State, I call attention to the history of Colorado legislation both territorial and state relative to the rights of corporations organized for the purpose of conveying water for irrigation and other purposes and I do this for the further purpose of controverting statements of counsel for the appellants to the effect that we had exappropriated Colorado territory for use in Nebraska and that as a corporation were not only violating the laws of Colorado but exceeding our rights and powers as a corporation and were practically subject to ouster from Colorado, virtually as an outlaw.

The territorial legislature of 1862 at its second session passed an act entitled

> "To Enable Road, Ditch, Manufacturing and other Companies to become bodies corporate." (Laws 1862, page 44.)

The ninth section of this act provides among other things, as follows:

> "That whenever any number of persons associate to form a company for the purpose of constructing a ditch for the purpose of conveying water to any mines, mills or lands, to be used for mining, milling or irrigating of lands, they shall, under their hands and seals, make a certificate which they shall specify as follows:"

Then follows the things specified which shall be mentioned in the certificate.

At the third session of the territorial assembly in 1864 this act was amended (Laws 1864, page 49) by an act entitled

> "An Act Entitled An Act to Amend 'An Act to Enable Road, Ditch, Manufacturing and other companies to Become Bodies Corporate.' "

Sections 4 and 5 of this act read as follows:

> "Section 4. If any company shall be formed under this act, for the purpose of carrying on any part of its business in any place outside of this Territory, the said certificate shall so state, and shall also state the name of the town and county in which the principal part of the business of said company, within this Territory, is to be transacted, and said town and county shall be deemed the town, place and county in which the operations and business of the company are to be carried on, and its principal place of business within the meaning and provisions of this act."
>
> "Section 5. The stock, property and concerns of such company shall be managed by not less than three nor more than nine trustees, who shall, respectively, be stockholders in said company, and a majority of whom shall be residents of this Territority, * * *."

The latter section was again amended at the fourth session of the Territorial Assembly (Laws of 1865, page 47) under the following title,

> "An Act to Amend An Act Entitled 'An Act Entitled An Act To Amend An Act To Enable Road, Ditch, Manufacturing and Other Companies to Become Bodies Corporate, Approved March 11th, 1864.' "

> "Be it enacted by the Council and House of Representatives of Colorado Territory:
>
> "That section five of said act shall be and the same is hereby amended by striking out the words 'and a majority of whom shall be residents of this Territory' in the fourth and fifth lines from the top of said section."

Thus giving emphasis to the right of non-residents to do exactly what we are doing.

McKinley vs. Wheeler, 130 U. S., 630, 632.

In 1868, under authority of the Territorial Legislature, laws of the Territory were compiled into the Revised Statutes of 1868.

Chapter Eighteen is a codification of the Territorial laws relative to the corporations.

Section 1 provides:

> "Sec. 1. At any time hereafter, any three or more persons who may desire to form a company for the purpose of carrying on any kind of manufacturing, mining, * * * dig ditches, build flumes, * * * or carry on any branch of business designated to aid in the industrial or productive interests of the country, may make, sign and acknowledge, etc. * * *"

> "Sec. 4. If any company shall be formed under this article, for the purpose of carrying on any part of its business in any place outside of this territory, the said certificate shall so state, etc. * * *"

The latter statutes remained unamended and in full force until the eleventh session of the Legislative Assembly in 1876

(Laws, 1876, page 40) when the Territorial Assembly amended Chapter Eighteen to read as follows:

> "An Act To Amend Chapter Eighteen (18) of The Revised Statutes of Colorado Territory, entitled 'Corporations.'"

Section 1 of the Act, among other things, enacted as follows:

> "And when any company shall be created under the laws of this Territory for the purpose of carrying on part of its business beyond the limits thereof, such certificates shall state that fact, and shall also state the name of that town and county in this Territory in which the principal office of said company shall be kept, and shall state the name of that county in which the principal business of such company is to be carried on within this Territory."
>
> "Section 2. Section four (4) of the act to which this is amendatory is hereby repealed."

Section 4 of the Revised Statutes of '68 of Colorado Territory contained a similar provision as that contained in the above amendment, the only effect of the amendment being to combine the two sections. This was the very year the constitution was adopted.

This same provision is embodied in the general laws of Colorado of 1877 in Section 192 thereof in the exact language as that contained in the amendment of 1876, but the laws of 1877 contained additional provisions with respect to ditch companies.

Section 274 provides (page 171):

> That any company organized "under the provisions of this act to form a company for the purpose of constructing a ditch for the purpose of conveying water to any mines, mills or lands, to be used for mining, milling or irrigation of lands, they shall, in their certificate, in addition to the matters required in section two (2) of this act, specify as follows: The stream or streams from which the water is to be taken; the point or place on said stream at or near which the water is to be taken out; the line of said ditch, as near as may be, and the use to which the said water is intended to be applied."

Section 192 of the General Laws of 1877 of Colorado is embodied *verbatim* as Section 238 of the General Statutes of Colorado of 1883 and Section 274 is contained in the General Statutes of 1883 of Colorado as Section 308 without change, alteration or amendment.

The same statutes are still in force and are carried into the Revised Statutes of Colorado of 1908, the first as section 847 thereof and the later section as section 988.

A compilation of the Colorado Statutes of 1912 by Mills gives the first Statute as Section 980 and the latter as Section 1092. These statutes are in full force and effect today.

So we find that throughout the legislative history of Colorado a general provision and recognition of the right of a corporation organized for irrigation purposes to construct its ditch to appropriate water to be transported for the purpose of irrigation not only within the State of Colorado but without the State.

These statutory provisions have always been in harmony with the decisions of the Supreme Court of Colorado until the attack made by the State of Kansas upon the claimed priorities in Colorado upon the Arkansas River. There has never been any doubt in the minds of any person, or any claim made, by priority holders nor by the State, until the filing in this court of the Kansas-Colorado case. This is borne out by the facts in this case, that for more than twenty (20) years the record shows that the appellee and its predecessor in interest without let or hindrance or claim of any kind, were permitted at all times to carry waters to the State of Nebraska for beneficial uses therein, at all times diverting the waters and irrigating the lands on each side of the State boundaries, in fact irrigating the lands of individuals which are divided by that artificial line. Thus it is in Colorado, there has always been by Statute, a direct, frank admission that all the lands in the dry and arid region of the Rocky Mountain plateau required water for irrigation and the Territory Assembly early enacted a Statute which acknowledged the right and permitted the diversion of water for the irrigation of those lands regardless of state lines, and that policy of the people of the Territory has remained as expressed upon the Statute Books of Colorado, although overlooked and forgotten in its late attempt to circumscribe the use of the water in an unfounded claim of ownership by the laws of 1917 as set forth in the brief of the appellant founded upon the illogical claim of a grant contained in the Colorado Constitution.

Concurrent with the foregoing statutes and as a part of the same corporation act of 1864 at the third session of the Territorial Assembly (Laws 1864, page 59), Section 33, provides as follows:

> "Any company constructing a ditch under the provisions of this Act shall furnish water to the class of persons using water in the way named in the certificate, as the way the water is designated to be used, whether miners, millmen, or farmers, whenever they shall have water in their ditch unsold, and shall at all times give the preference to the use of the water in said ditch to the class of persons so named in the certificate, the rates at which water shall be furnished to be fixed by the county commissioners, or the tribunal transacting county business, as soon as such ditch shall be completed and prepared to furnish water."

This section is found in the Revised Statutes of 1868, Section 33, Chapter XVIII. The same section is carried into the General Laws of Colorado of 1877 as Section 277, and the General Statutes of Colorado of 1883 as Section 311, and in the Revised Statutes of 1908 as Section 992. In the General Laws of 1877 some slight changes were made, but the general text remains the same.

This legislation, in connection with the express permission of ditch companies to transact their business both within and without the State carries conviction that there never was any doubt or hesitation on the part of the legislature to permit the incorporation of a company like the appellee to construct and maintain a ditch and to divert and appropriate water for the use of lands whether within or without the State of Colorado.

To now say that this appellee is engaged illegally in diverting water for use in Nebraska is to hold that the entire system of legislation of Colorado has no force or effect whatever and was and is meaningless and without purpose.

These statutes being amended and re-enacted at various times and also during the very year the Constitution was adopted may well be looked to in ascertaining the intent and purpose of the people in adopting the provisions of the Constitution relative to the waters of the natural streams of Colorado. While the language of the Constitution may be clear and unambiguous and interprets itself, yet in view of the claim of the appellants that those sections embrace a positive grant to the state of a property right in those waters, the statutes above referred to throw an entirely different light upon the public policy of the State throughout its entire history, and sets at naught the later-day contention of state ownership.

The right of Colorado to the waters of the State is that of a sovereign and not that of owner. The waters being subject to appropriation, that right as stated in the Constitution

is general in the public, not the public as represented by the inhabitants of the State, but the entire United States. The right is common to all who comply with the law respecting the appropriation of such waters.

NEITHER THE CONSTITUTION NOR STATUTES OF COLORADO LIMIT PLACE OF USE TO LANDS WITHIN THE STATE.

Nowhere in the history of Colorado laws can there be found a limitation, express or implied, either as to the persons or corporations who may make an appropriation or *the place of its use.*

And this statement is confirmed by the decisions of the Colorado Supreme Court. In *Coffin vs. Left Hand Ditch Company,* 6 Colo., 443, 449, this language is used:

> "In the absence of legislation to the contrary, we think that the right to water acquired by priority of appropriation thereof is not in any way dependent upon the *locus* of its application to the beneficial use designed."

Again, in *Thomas vs. Guiraud,* 6 Colo., 530, 532:

> "We have also decided that the *locus* of its application does not in any way affect the doctrine."

Upon the authority of the foregoing cases the Circuit Court of Appeals of the 8th Circuit in *Perkins County vs. Graff,* 114 Fed., 441, 446, it is held as follows:

> "It is contended that the acceptance and execution of this proposal (to construct a ditch with its headgate in Colorado for the purpose of irrigating lands in both Colorado and Nebraska) would violate the constitution and laws of Colorado, because the waters of the river in that State were reserved by its constitution and laws for its people. But the constitution, the statutes, and the judicial decisions of Colorado limited the power of its citizens to use the waters of the rivers of that State to the amounts which are necessary for the beneficial uses to which they apply or intend to apply them (citing above cases). The constitution and laws of that State have been in force for many years, and yet there is a surplus of the waters of the Platte River, which

> flows from the State of Colorado into the State of Nebraska. No reason is perceived why the irrigation company might not lawfully withdraw this surplus water from the river at such place in the State of Colorado as it should select, and lead it through a portion of that State into the county which issued these bonds, to irrigate the arid lands in that region. Corporations of other States are not prohibited from transacting business in the State of Colorado. There is no law of that State to which our attention has been called which prohibits such corporations from obtaining by purchase the right of way through private property, and no reason is perceived why the scheme of the irrigation company was not both rational and lawful."

In other words, the waters of non-navigable streams of Colorado are no more vested in the State of Colorado as a proprietor, with right to limit their use to the inhabitants of that State, than are the navigable waters in other States, limited in their use to the inhabitants of that State. The rights in either cannot be exclusive, either to a few people of a State, nor the residents of the same State, but are common to all of the people of the entire United States, who comply with the local laws.

It is not the contention of the appellee at this time, nor has it ever been, that it has any rights superior to any other appropriator because it is diverting water for irrigation of lands within both States. But its position now is, and always has been, the acceptance of the fundamental doctrine upon which the right of appropriation of water in Colorado is based that "first in time is prior in right," regardless of State lines. This contention is in harmony with all State legislation of both Colorado and Nebraska, and the public policy of both States as shown and determined by their legislation.

Source of Title.

The contention of state ownership and by reason thereof that the Courts have no jurisdiction, is further shown to be fallacious and unfounded when the nature of title in water and the source of such title is considered in connection with the common law and the political history of Colorado.

Whatever ownership may exist in water as distinguished from the rights of Colorado as a sovereign is predicated upon its beneficial use either under the laws of Colorado or of the United States.

Washburn describes property in water as follows:

> "Property in water in connection with real estate can only be predicated of its use, which serves by its enjoyment to give a value to the corporeal hereditaments with which its use is applied. * * *
>
> "Nor can this right be considered as an easement, since it belongs to the estate of the land owner through which it flows, as forming one of the elements of which the estate is composed."
>
> 2 Washburn's Real Property, p. 366-7 (5th Ed.).

That is the property right, if any, which is claimed by the State of Colorado.

It is a right predicated of private ownership of the soil, and not subject of ownership independent thereof, except by grant from such owner.

> "In one thing all writers agree, and that is in considering that there are two modes only * * * of acquiring title to land; namely, descent and purchase; purchase including every mode of acquisition known to the law except descent."
>
> 3 Washburn R. P., p. 4 (5th Ed.).

The property right in water of the natural streams prior to appropriation by its very nature, has always been in existence, and has since the discovery of this continent, been vested in the discoverers and their grantees.

The Common Law.

The Common Law, as defined by the Supreme Court of Colorado is:

> "Under that system of jurisprudence (the common law) the right to the use of running water of the natural stream, not navigable, is an incident to the ownership of the soil through which it flows. It is a part of the freehold, and passes only by grant or *prescription.* 3 Kent Comm., 439; Ang. Water Courses, Sec. 8; *Gardner vs. Village of Newburg,* 2 Johns Ch., 162; *Davis vs. Fuller,* 12 Vt., 178."
>
> Platte Water Co. vs. Northern Colo. Co., 12 Colo., 525, 531, 532.

"A riparian proprietor, owning both sides of a stream, may divert the water therefrom, provided he returns the same to the natural stream before it leaves his own land, so that it may reach the riparian proprietor below without material diminution in quantity, quality or force."

Oppenlander vs. Ditch Co., 18 Colo., 142, 148.

"It is accordingly now quite generally held in this country and in England, that, after the natural wants of all riparian proprietors have been supplied, each proprietor is entitled to a reasonable use of the water for irrigation purposes."

Jones vs. Conn., 39 Ore., 30, 36.

"The authorities are unanimous to the effect that the use of water for irrigation is one of the common law rights of a riparian proprietor."

Clark vs. Allaman, 71 Kans., 206, 241.
Benton vs. Johncox, 17 Wash., 277, 289.
Wiel, Water Rights, 3rd Ed., pp. 807, 812, 815, 818, 819.

Under the common law land embraced water.

Coke on Littleton, 4 A.
2 Blackstone's Com., 17, 18.

In *McCarter vs. Hudson Water Co.*, 70 N. J. Eq., 695, 707-8, the Court held that flowing water in its natural state was not personal property, but real property, being as much a part of the land as the soil and rocks; that the common law held the owner of the soil to be the owner of all above it and all beneath it.

The right to the use of water being thus one of the elements of which the estate in land is composed, it becomes necessary to examine the historical abstract of the title of Northeastern Colorado.

The Louisiana Purchase.

Political History of the United States informs us that the northeast portion of Colorado was a part of the Louisiana Purchase, acquired by the United States from France in 1803. Article 1 of the treaty provided, among other things:

> "And Whereas, in pursuance of the treaty * * * the French Republic has an incontestible title to the domain and to the possession of the said territory, the First Consul * * * doth hereby cede to the United States * * * forever, and in full sovereignty, the said territory, with all its rights and appurtenances."

Article IV provided for the livery of seizin of the territory in accordance with the civil laws of France.

The Code Napoleon, Article 644, provided:

> "He whose property borders on running water other than that which is declared a dependency of the public domain by Article 538, may enjoy it in its passage, for the watering of his property. He whose estate is intersected by such water is at liberty to make use of it within the space through which it runs, but on condition of restoring it at the boundaries of his fields to its ordinary course."

The common law gave to the riparian owner identically the same rights.

Thus, whatever title the United States received by the Treaty of Paris to the land embraced within the Louisiana Purchase, whether of sovereignty or of private ownership, it passed to the United States the right of a riparian owner.

If there exists any ownership of property right in water of whatsoever nature, character or degree, that title was vested in the United States and remained there, unless by the Organic Act or the admission of Colorado into the Union, Congress granted such rights to the State of Colorado.

Admission of Colorado.

The Organic Act establishing the territory of Colorado, granted to the Territorial Legislature the power to legislate upon all rightful subjects, consistent with the provisions of the Constitution of the United States and of the Organic Act.

> "But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States."
>
> Sec. 6, Organic Act.

Section 15 of the Organic Act provided that the Constitution and all laws of the United States, not locally inappli-

cable, shall be in full force and effect within the Territory of Colorado.

The Enabling Act, authorizing the people of Colorado to form a constitution, provided by Section 4, among other things:

> "And provided further, that said convention shall provide by an ordinance, irrevocable without the consent of the United States and the people of said State * * *. Secondly, that the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain in the sole and entire disposition of the United States."

In the Election Ordinance prepared in compliance with the Enabling Act, the following resolution was adopted:

> "In conformity with the requirements of an Act of Congress of the United States, entitled, etc., * * * On behalf and by the authority of the people of the Territory of Colorado, this convention assembled in pursuance of said Enabling Act * * * does ordain and declare: First. * * * Secondly, that the people inhabiting the Territory of Colorado, by their representatives in said convention assembled, do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposal of the United States. * * * "

While the new States were all admitted to the Union upon an equal basis with equal powers and equal limitations with the older States, Colorado, like all of the public land States, was required to adopt the foregoing irrevocable Ordinance, and Congress not only has the power of disposition over the public lands, but authority to police them as well.

Light vs. U. S., 220 U. S., 523.

There the Court said at page 537:

> "These rights are incident to proprietorship to say nothing of the power of the United States as a sovereign over the property belonging to it."

Sec. 5 of the Enabling Act provided for an election to be held for the purpose of ratifying the Constitution, at such time as might be provided by the Constitutional Convention, in the month of July, 1876, and that the returns of such election should be made to the Acting Governor of the Territory, who, together with the Chief Justice and United States Attorney of the Territory, should canvass the same, and if a majority of the votes should be cast for the said Constitution, and the Acting Governor should certify the same to the President of the United States, together with a copy of the Constitution and ordinances, that it should thereupon be the duty of the President of the United States to issue his proclamation declaring the State admitted into the Union on an equal footing with the original states "*without any further action whatever on the part of Congress.*" Upon the election being certified, the President of the United States issued his proclamation under date of August 1, 1876, admitting the State to the Union.

The Proclamation of President Grant after reciting the Acts of Congress relative to authorizing inhabitants of the Territory of Colorado to form a State Government and reciting the further provisions of the Act of Congress, is as follows:

> "And, Whereas, It has been certified to me by the acting governor of said Territory of Colorado that within the time prescribed by said act of Congress, a constitution for said proposed state has been adopted, and the same ratified by a majority of the legal voters of said proposed new state in accordance with the conditions prescribed by said act of Congress,
>
> "And, Whereas, A duly authenticated copy of said constitution and of the declaration and ordinance required by said act has been received by me.
>
> "Now, Therefore, I, Ulysses S. Grant, President of the United States of America, do, in accordance with the provisions of the act of Congress aforesaid, declare and proclaim the fact that the fundamental conditions imposed by Congress on the State of Colorado to entitle that state to admission to the Union have been ratified and accepted, and that the admission of the said state into the Union is now complete."

The President did not certify that the Constitution of Colorado was in accord with the Constitution of the United States or even in accord with the provisions of the Enabling Act. The President said only that it had been certified to him

by the acting governor of the Territory of Colorado that a constitution had been formed within the time prescribed, and the same had been ratified by a majority of the legal voters of the proposed new state, in accordance with the provisions prescribed by the Enabling Act. The President, therefore, proclaimed by virtue of certificate of the governor and the receipt of copies of the Constitution and ordinances, that the fundamental conditions imposed by Congress had been ratified and accepted by the people inhabiting the Territory of Colorado.

1 Mills Ann. Stat., 110 (1891).

There is no record that Congress ever saw the Constitution of Colorado. Congress never, in any manner, ratified, approved or confirmed it. Both the Territorial Organic Act and the Enabling Act were careful and particular in protecting the property of the United States.

There is no transfer, by either the Organic Act establishing the Territory, or by the Enabling Act, permitting the organization of the State, whereby water, or any title thereto or any interest therein, was transferred to the State.

The Enabling Act did not require that the President should examine, approve or ratify the copy of the Constitution of Colorado filed with him. His proclamation does not say that he examined, approved or ratified it. It does not even say that he read it. It is not on record that he did. He certainly did not attempt to approve or ratify it. If he had, his approval and ratification would not have bound Congress or the United States. Such an attempted ratification by the President would not have conveyed any property of the United States to the state. The President has no power to dispose of the property of the United States. That power is by the Constitution vested exclusively in Congress. Neither did Congress in its Enabling Act or otherwise delegate that power to the people inhabiting the Territory of Colorado.

The State Constitution was not ratified or approved by any Act of Congress, nor by any act of any Federal Official. That the adoption of the Constitution by the people of Colorado, and the proclamation of President Grant, did not have the effect of a recognition by the United States of the declaration of the State Constitution respecting the ownership of water, was determined by the Supreme Court of Colorado in the case of *Hartman vs. Tresise*, 36 Colo., 146, 149. The State Legislature had in 1903 adopted a statute permitting the public to fish in any stream in the state, stocked at public expense. Tresise was sued in trespass for fishing in a natural stream, stocked at public expense. The trial Court said:

"The ratification of this (Colorado) Constitution by the United States Government amounted to a declaration on the part of the Government that the state should have a perpetual easement over the public lands of the United States for the natural streams contemplated by the Constitution, of which these streams were a part, and that all persons acquiring a part of the public domain acquired the same subject to this Constitutional provision and this right of the State."

Of this the Supreme Court said:

"*The conclusion reached by the trial court is not tenable.* The section of the Constitution relied upon declares the unappropriated waters of our natural streams to be the property of the public, and dedicates the same to the use of the people of the state, subject to appropriation, as in that instrument provided; and the following section provides that the right to divert the same to beneficial uses shall never be denied. *It is this right of appropriation which the general* government has recognized and confirmed, and subject to which its grant of public lands in the arid states since 1866 have been made."

Even though our Constitution had been supervised by Congress, it would still be a State Constitution and not an Act of Congress.

Coyle vs. Smith, 221 U. S., 559, 568.
Ex parte Webb, 225 U. S., 663, 690.
Wilcox vs. Jackson, 13 Peters, 498, 516.

Our Colorado Court has held that a Constitution is not a grant of rights to the people but a limitation of power.

Packer vs. People, 8 Colo., 361, 364-5.

If but a limitation of power and not a grant, by the most liberal stretch of imagination it did not transfer property.

Neither acquiescence nor silence of Congress will be a ratification of unauthorized power or rights assumed by a state.

B. & O. Ry. vs. Baugh, 149 U. S., 368, 399.
U. S. vs. Utah Power Co., 209 Fed., 554, 560.

Words of grant in express terms must be found before Colorado can claim title to the water.

> Coosaw M. Co. vs. State, 144 U. S., 550, 562
> Title Co. vs. Guarantee Co., 174 Fed., 385, 387.
> U. S. vs. D. & R. G., 150 U. S., 1, 14.
> U. S. vs. Oregon Co., 186 Fed., 861, 892.
> Oregon R. R. Co. vs. Oregon Ry. Co., 130 U. S. 1-26.

Colorado proceeds on the theory that as irrigation is a necessity in Colorado it knows no law; therefore the state had a right, under the law of necessity, to confiscate the property rights of the United States and vest same in itself. The law of "necessity" cannot confer rights or vest property.

> Lux vs. Haggin, 69 Calif., 255, 311.
> Benton vs. Johncox, 17 Wash., 277, 283.
> U. S. vs. Rio Grande Irrig. Co., 174 U. S., 690, 703.

The extent to which Colorado has gone in its claim to ownership of the natural streams of Colorado was declared by the Supreme Court in *Stockman vs. Leddy,* 55 Colo., 24, 29, to this effect:

> "that the waters of the natural streams of this state belong to the people, to the state, in its sovereign capacity, and that its rights to their distribution and control within its borders is free from any interference by any other sovereignty."

The Court further contends that the "ratification" of the Colorado Constitution and the state's admission into the Union was an express recognition of Colorado's ownership of the water. The historical fact is, it was not "ratified" or recognized by Congress. Nor, in view of the declarations of the Supreme Court above cited, is the Colorado constitutional claim to the water of any effect as against the United States or the grantees of the public domain within its borders, nor those making valid appropriations of water for beneficial purposes.

> "The adoption in the Constitution of a state, or the enactment by its Legislature, of a provision that all waters within the state are the property of the state or the public, can in no way effect the rights of the United States in and to those waters, but all

rights acquired by the state must be subject to the rights of the general Government. * * *

"A state, therefore, has the power to dedicate its waters to itself or to the public, as far as its own rights in those waters are concerned, and to regulate the use between its citizens. But to hold that a state Constitutional convention or a State Legislature could virtually appropriate all the waters flowing over the public domain and belonging to the United States to itself, and acquire a good title thereto, would be too much like holding that an individual could make a deed to himself of other people's property and acquire a good title thereto."

1 Kinney, Irrigation (2nd Ed.), Sec. 388, pp. 657, 660.

No claim was made to ownership during territorial days, no grant having been made by Congress by the Enabling Act nor the Constitution ratified by Congress, there is no other source of claim other than the provisions of the Colorado Constitution itself. Property rights cannot be created or divested by mere declaration of ownership.

THE CLAIM OF STATE OWNERSHIP BY COLORADO IS INCONSISTENT WITH THE RIGHT TO ACQUIRE TITLE BY PRESCRIPTION.

Colorado recognizes, as heretofore shown, the rights to the continued use of water may be acquired by prescription. Thus the State of Colorado most certainly has no title to water because a prescriptive right to property cannot be acquired as against a State.

The finding of the trial court was that the appellee had acquired title by prescription and the Court disposed of the case upon that theory. (Record, pages 25, 28.)

Neither in the Court of Appeals nor in this Court is error assigned upon this ruling, nor is the point anywhere argued.

TITLE CANNOT BE VESTED BY MERE FIAT OF LAW.

If there can be any title in the running water of the natural streams before the actual appropriation and diversion of the water to a beneficial use, that title cannot become vested either in a person or the State by mere fiat of law.

In *Peyton vs. Desmond*, 129 Fed., 1, 10, Justice Van Devanter said:

"A state cannot by its legislation restrict or effect the authority of the officers of the Land Department in the disposition of the public lands of the United States or WITHHOLD FROM THE GRANTEES OF THE UNITED STATES ANY OF THE INCIDENT OF THE TRANSFER OF THE GOVERNMENT'S TITLE."

Citing:

Bagnell vs. Broderick, 13 Pet., 436, 450.
Wilcox vs. McConnell, 13 Pet., 498, 516.
Irvine vs. Marshall, 20 How., 558, 564.
Gibson vs. Chouteau, 13 Wall., 92, 99.
Langdon vs. Sherwood, 124 U. S., 74, 84.
Paige vs. Peters, 70 Wis., 182.

The same rule is laid down in *U. S. vs. Rio Grande Irr. Co.*, 174 U. S., 690, 706.

The right which a state has to declare itself to be the owner of private property is well stated in *Rossmiller vs. State*, 114 Wis., 169, 179 (58 L. R. A. 93), concerning the ownership of a state in the waters and ice formed on navigable lakes. The Court said:

"Is ice, formed naturally upon the public waters of the state, state property in a proprietary sense—property which it can deal with as a private person deals with his property rights? *It must be assumed, without discussion, that no property right was acquired by the state by the mere legislative declaration that ice formed upon meandered lakes within the boundaries of the state belong to the state as property. The Legislature has no such arbitrary power under our constitutional system as that of changing the nature of the ownership of property by its mere fiat. It can no more accomplish that result in that way than it can change the laws of nature by a legislative declaration.* Ice formed on public ways is the absolute property of the state, independent of any legislative assertion in that regard, or not at all. * * * 'An enactment of the Legislature, based on an evident misconception of what the law is will not have the effect *per se* of changing the law so as to make it accord with the misconception.' *Byrd vs. State*, 57 Miss., 243."

TITLE IN UNITED STATES.

That Congress has the sole and exclusive power to prescribe the time, conditions and mode of the disposition of property of the United States, cannot at this time be questioned.

The appellee contends that the beneficial use of water in the arid states was and is a species of property within the purview and intent of Par. 2, Sec. 3, Art. IV, of the Federal Constitution:

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States, and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or any particular state."

Chief Justice Marshall, speaking of public lands and the nature of the title, said, in *Johnson vs. McIntosh,* 8 Wheat., 543, 603:

> "It has never been contended that the Indian title amounted to nothing. Their right of possession has never been questioned. The claim of the government extends to the *complete ultimate title,* charged with this right of possession, and to the exclusive power of acquiring that right."

The Supreme Court again said, in *Irvine vs. Marshall,* 20 How., 558, 562:

> "It cannot be denied that all the lands in the territories not appropriated by competent authority before they were acquired, are in the first instance the *exclusive property* of the United States, to be disposed of to such persons, at such times, in such modes and by such titles as the government may deem most advantageous to the public fisc, or in other respects most politic."

In *U. S. vs. Cook,* 19 Wall., 591, 592, Waite, C. J., speaking of lands occupied by Indians, said:

> "The fee was in the United States, subject only to this right of occupancy * * *. The possession when abandoned by the Indians attaches itself to the fee, without further grant."

In *U. S. vs. Four Bottles of Sour Mash Whiskey,* 90 Fed., 720, 722, it is said:

> "It is also settled by the decisions of the Supreme Court that the government of the United States is the primary and ultimate source of title to the public domain."

The title acquired by the Treaty of Paris to the Louisiana Purchase carried with it the fee title absolute, and with that fee title there became vested in the United States property right in the non-navigable streams of that territory for irrigation.

In *Winters vs. United States,* 207 U. S., 564, it appears that Congress had made an agreement with Indians in Montana, by which a reservation was set aside for the Indians in order that they might become self-supporting as agricultural people. No mention, however, was made of water rights. Milk River flowed through the reservation, the waters of which were, subsequent to May 1, 1888, above the reservation appropriated by settlers for irrigation purposes under the Desert Land Act of 1877, and before any appreciable quantity of water had been used by the Indians. Both the land settled upon by the whites and the reservation were desert lands and irrigation indispensable. That the value of the water rights of the whites exceeded $100,000, and a large community had grown up dependent upon these waters. They had no notice of any claim on behalf of the United States or the Indians that the waters had been reserved. Of this the Court said, pages 576, 577:

> "The lands were arid, and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and 'civilized communities could not be established thereon.' And this, it is further contended, the Indians knew, and yet made no reservation of the waters. *We realize that there is a conflict of implications, but that which makes for the retention of waters is of greater force than that which makes for their cession.* * * *
>
> "Another contention of appellants is that if it be conceded that there was reservation of the waters of Milk River by the agreement of 1888, yet the reser-

vation was repealed by the admission of Montana into the Union, February 22, 1889, c. 180, 25 Stat., 676, 'upon an equal footing with the original States.' The language of counsel is that 'any reservation in the agreement with the Indians, expressed or implied, whereby the waters of Milk River were not to be subject to appropriation by the citizens and inhabitants of said State was repealed by the act of admission.' But to establish the repeal counsel rely substantially upon the same argument that they advance against the intention of the agreement to reserve the waters. *The power of the government to reserve waters and exempt them from appropriation under the State laws is not denied, and could not be. The United States vs. The Rio Grande Ditch & Irrigation Co.*, 174 U. S., 690, 702; *United States vs. Winans*, 198 U. S., 371. That the government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste—took from them the means of continuing their old habits, yet did not leave them the power to change to new ones." (Italics ours.)

Likewise in *U. S. vs. Rio Grande Irr. Co.*, 174 U. S., 690, 703, it is said:

"Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized; first, that in the absence of specific authority from Congress, *a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream* to the continued flow of its waters; so far, at least, as may be necessary for the beneficial uses of the government property. * * *" (Italics ours.)

And again, at page 704, speaking of the Act of 1866:

"The effect of this statute was to recognize, so far as the United States are concerned, the validity of the local customs, laws, and decisions of courts in respect to the appropriation of water."

If the United States as the owner of the public domain did not own the water, there was nothing to reserve, as stated in the Winters case, nor was it necessary for Congress to recognize the validity of local laws relative to appropriation as said in the Rio Grande case.

In *United States vs. Rio Grande Irr. Co., supra,* the Court further said, page 706:

> "Obviously, by these Acts, so far as they extended, Congress recognized and assented to the appropriation of water, in contravention of the common law rule as to continuous flow. To infer therefrom that Congress intended to release its control over navigable streams of the country, and to grant in aid of mining industries and the reclamation of arid lands, the right to appropriate the waters on the sources of navigable streams, to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits. This legislation must be interpreted in the light of existing facts—that all through this mining region in the West were streams not navigable, whose waters could safely be appropriated for mining and agricultural industries without serious interference with the navigability of the rivers into which those waters flow. And in reference to all these cases of purely local interest, the obvious purpose of the Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law rule, which permitted the appropriation of those waters for legitimate industries. *To hold that Congress by those acts meant to confer upon any state the right to appropriate all the waters of the tributary streams which unite into a navigable water course,* and so destroy the navigability of that water course, in derogation of the interests of all the people of the United States, *is a construction which cannot be tolerated.* It ignores the spirit of the legislation, and carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to have been the intent of Congress." (Italics ours.)

In *Gutierres vs. Albuquerque Land Co.,* 188 U. S., 545, the question arose over the diversion of waters in the Rio Grande River. The contention was that the statutes of New Mexico permitting the diversion of water were in contraven-

tion of the rights of the United States to dispose of its property right in water, but the Court held that as the Act of Congress had permitted diversion of water for beneficial purposes from the natural streams, the right of diversion of water from the Rio Grande could not be evaded. At page 553 the Court said:

> "By the Act of March 3, 1877, the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, a part of the public domain, *was granted,* and it was further provided that 'all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights."

And on page 554:

> "Of course, as held in the Rio Grande case (p. 703) even a state, as respects streams within its borders, *in the absence of specific authority from Congress, 'cannot by its legislation destroy the right of the United States as the owner of the lands bordering on a stream,* to the continued flow of its waters; so far at least as may be necessary, for the beneficial uses of the government property.' * * * Necessarily these limitations are equally applicable in restraint of the legislative branch of a territorial government controlled, as is such body, by Congress." (Italics ours.)

It is held in *Wilcox vs. Jackson,* 13 Peters, 498, 507-517, that after title passes from the United States the land is subject to state legislation, so *far as such legislation is consistent with an admission that title passed and vested according to the laws of the United States.*

Nothing to the contrary of these decisions can be found in the *Kansas-Colorado case* (206 U. S., 46). While that case recognizes (p. 93) the right of each state to exercise jurisdiction over the lands within its borders, including the beds of streams and their waters, yet the Court nowhere recognizes the right of ownership in the water itself, as ever having been vested in the state, and the final result of that case is stated, on page 114, to be as follows:

> "And yet when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two states forbids any interference with the present withdrawal of water in Colorado for the purposes of irrigation."

The Court, in *Light vs. U. S.*, 220 U. S., 523, speaking of the ownership of the public domain, said, page 536:

> "But '*the Nation is an owner,* and has made Congress the principal agent to dispose of its property. * * *' 'Congress is the body to which is given the power to determine the conditions upon which the public lands shall be disposed of.' *Butte City Water Co. vs. Baker,* 196 U. S., 126. '*The government has with respect to its own land the rights of an ordinary proprietor to maintain its possession* and prosecute trespassers. *It may deal with such lands precisely as an ordinary individual* may deal with his farming property. It may sell or withhold them from sale.' *Camfield vs. U. S.*, 167 U. S., 524. And if it may withhold them from sale and settlement it may also, as an owner, object to its property being used for grazing purposes, for 'the government is charged with the duty and clothed with the power to protect the public domain from trespass and unlawful appropriation.' *U. S. vs. Beebee,* 127 U. S., 342. The United States can prohibit absolutely, or fix the terms on which its property may be used. As it can withhold or reserve the land, it can do so indefinitely. *Stearns vs. Minn.,* 179 U. S., 243. It is true that 'the United States does not and cannot hold property as a monarch may, for private or personal purposes.' *Van Brocklen vs. Tenn.,* 117 U. S., 158, *but that does not lead to the conclusion that it is without the rights incident to ownership.*" (Italics ours.)

That action concerned a trespass upon the Forest Reserves of the government, within the State of Colorado, and this Court thus defined the manner and form of holding the public domain. As it is held by the United States as a private owner, every attribute incident to the private ownership of land is incident to the ownership of the United States. As defined by the authorities hereinbefore cited, the ownership of water, and the usufructuary right of water by a riparian

owner, is an incident to the ownership of land by the United States. Thus, it cannot be said, that title of any kind of character was vested in the State of Colorado, either by the organic act establishing the territory or the enabling act permitting the state to enter the Union, nor did Colorado acquire by the fiat of its Constituiton a property right, the disposition of which was reposed solely in Congress and which Congress has never, as yet, transferred or conveyed to the state. Therefore the State of Colorado does not have, nor has it ever had, dominion over water or water rights, *as an owner,* but it can only exercise jurisdiction over its disposition as it exercises jurisdiction over the disposition of any other property within its borders, the *jurisdiction as a sovereign, not as an owner.* Whatever water rights the government has granted to Colorado, it granted under the Act of 1866, to private citizens and not to the State of Colorado.

If there has been any doubt about the construction of the second paragraph, Sec. 3, Art. 4, of the Federal Constitution, it has been settled beyond a doubt by this Court in the *Kansas-Colorado case* (206 U. S., 46, 91, 92). In that case the Court construes it to embrace all of the property rights in and to the public domain, which necessarily includes water.

Before the adoption of the Constitution in Colorado there was no contention of public ownership of the water, but it was admitted that the right was based upon and derived from the title of the government. Judge Hallett in 1872, then upon the Territorial Supreme Court, and for thirty years thereafter Federal District Judge of Colorado, in the case of *Yunker vs. Nichols,* 1 Colo., 551, 554, said:

> "All the lands in this territory which are now held by individuals were derived from the general government, and it is fair to presume that the government intended to convey to the citizens the necessary means to make them fruitful" (to-wit: the water).

That statement has never been criticized, modified or overruled by any decision of the Colorado Court. It was written during the formative period of Colorado Irrigation laws which were later codified and extended by the Act of 1879.

The right to the beneficial use of water, in Colorado, is real estate.

The Colorado Supreme Court has repeatedly held that the right to the use of water is deemed real estate, and is a distinct subject of grant and may be transferred either with or without the land for which it was originally appropriated.

It may be changed and used on entirely different and remote lands. In fact the right of transfer is entirely unrestricted, and may be transferred to either residents or non-residents to be used either within or without the state.

Strickler vs. Colo. Spgs., 16 Colo., 61, 70.
Arnett vs. Linhart, 21 Colo., 188, 190.
Wyatt vs. Irrigation Co., 18 Colo., 298, 307.
Ins. Co. vs. Childs, 25 Colo., 360, 363.
Davis vs. Randall, 44 Colo., 488, 492.
Bessemer Co. vs. Wooley, 32 Colo., 437, 442.

In *Nichols vs. McIntosh*, 19 Colo., 22, 27, the Court held that the property rights in water consisted in the priority of the appropriation, as well as in its amount, and that such property rights were protected by the Constitution of the state.

A "water right", as said in *Ironstone Ditch Co. vs. Ashenfelter*, 57 Colo., 31, 39,

> "is one of the most valuable property rights known to the law of this state which in no way depends on the place of its application, and is not confined to the land upon which the right came into existence; but may be sold separate from the land and changed from one place to another."

Numerous other decisions of the state have held to the same effect; so that in Colorado it is now a rule of property, and with respect to that property a *property right*, in the appropriator, not the state.

As a property right it was vested somewhere before white people settled in Colorado. The United States acquired it in 1803 and then became the vested owner. As Colorado cannot disclose a transfer from the United States to it, it ought not be heard to say that such property was not vested in the United States, or that it does not fall within the provisions of Paragraph 2, Sec. 3, Art. 4, Federal Constitution.

The property right to use the water of flowing streams cannot arise from nothing. It springs from a right which existed and is a right which has always been vested in the ownership or use of land. Property rights must come either by purchase or descent. Purchase includes every form of grant including prescription. *Neither the states nor individuals can obtain property from the United States by prescription.* Adverse possession and the statutes of limitation do not apply against the United States. We have shown there

has been no grant by the United States, to the State of Colorado up to August 1, 1876. The only other known way for the state to make any legal claim of its sovereign ownership of what had theretofore been the real property rights of the United States as proprietor, is to evoke the real property law of descent—under which Colorado makes no claim.

ACT OF CONGRESS, JULY 26, 1866.

(Sec. 2339, R. S., U. S., 1878.)

Prior to 1866 there was no Act of Congress providing for the disposition of mineral lands or rights in water.

The Act of Congress of 1866 provided for a method of locating public mineral lands, and in the same act, as part thereof, provided for the acquisition and confirmation of the right to divert water from natural streams for mining, agricultural and domestic purposes.

The history of the Act of 1866 in Congress discloses that Sec. 9 of the Act was first introduced in the House of Representatives with no provision whatever respecting mining. The other sections were added after the introduction of the bill, by amendments. It will be observed that Sec. 9, respecting the use of water, is the only part of the Act wherein is used the word "vested". It was evidently contemplated by Congress that patents should apply to lands, and the right or vested interest in the use of water must be evidenced by compliance with such statutory regulations as should be enacted by the states, or rules of the district, because, as between individuals, the right was then regulated by statutes of the states and territories of the arid west. As no deed or patent was required by those statutes, none was required by Congress. In Colorado no other evidence of the right was required or permitted until the Irrigation Act of 1879.

The right acquired by the diversion of water from nonnavigable natural streams of the arid regions of the United States, so far as such rights relate to the public domain, must be in compliance with that Act, and interpreting the section of that Act referring to the diversion and use of water, resort must be had to the method of acquiring public mineral lands.

Possessory rights to the public mineral domain under that Act, as well as under the present Acts of Congress, are obtained by discovery, and then by a full compliance with the *"local rules and regulations"* of the locality, including state statutes and local Court decisions. It is not necessary to protect the possessory right by patent, and no patent need ever be issued to enable the locator of mineral lands to enjoy the benefits of the same to the utmost; yet if he desires the fee

title it can be acquired thereafter by compliance with other provisions of the Federal statute.

As said in *Belk vs. Meagher*, 104 U. S., 279, 283:

> "Congress has seen fit to make the possession of that part of the public lands which is valuable for mineral *separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States.*"

In a later case, *Elder vs. Wood*, 208 U. S., 226, 232, the Supreme Court held that such possessory right was a subject of taxation and could be sold and the title passed by tax deed.

If it was the intent of Congress, as the Act of 1866 has been construed, to provide for a separation of a portion of the fee title, to-wit: the possessory right of a mineral claim, I contend that the same construction must be placed upon the provision with respect to the water rights in streams upon the public domain. In other words, citizens can acquire by priority of possession rights to the use of water for mining, agricultural, manufacturing or other purposes, whenever such rights are recognized by the "local customs, laws and decisions of courts," separate from the fee title of the riparian land. This contention is supported by the decisions of this Court.

In *Jennison vs. Kirk*, 98 U. S., 453, 456, the Court said:

> "The object of the section was to give the sanction of the United States, the proprietor of the lands, to *possessory rights*, which had previously rested solely upon the local customs, laws and decisions of the Courts, and to prevent such rights from being lost on a sale of the lands. *The section is to be read in connection with the other provisions of the Act of which it is a part*, and in the light of matters of public history relating to the mineral lands of the United States. * * * The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, *except as against the government, he was regarded as the original owner, from whom title was to be traced.* But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when they were not on the banks of a stream or lake, became, there-

> fore, an important and necessary business in carrying on mining. Here, also, *the first appropriator of water* to be conveyed to such localities for mining or other beneficial purposes, *was recognized as having, to the extent of actual use, the better right.* * * * (460) *And it was for the purpose of securing rights to water,* and rights of way over the public lands to convey it, *which were thus recognized, that the ninth section was adopted.*"

In *Broder vs. Water Co.,* 101 U. S., 274, 276, the Court said, speaking of the ninth section of the Act:

> "It is the established doctrine of this Court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. *We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.*" (Italics ours.)

The same method of acquiring possessory rights to water and possessory rights to mineral lands is provided by the Act. The entire fee being vested in the United States, to be disposed of under the provisions of the Acts of Congress, Congress had the right, as said in *Belk vs. Meagher, supra,* to separate the possessory right from the fee, and the Act so provided for both mineral lands, and water rights in the natural streams.

The first construction placed upon this Act by the Supreme Court of the United States was in the case of *Atchison vs. Peterson,* 20 Wall., 510, in an opinion written by Justice Field, than whom no one was more familiar with the history of California, the needs of the miners, their local customs, rules and regulations relative to mining, and the rights for which the Act of 1866 was enacted to perpetuate and secure.

After recognizing the customs long obtaining among the miners of the Pacific states and territories, and the use of the waters therefor, it is said at page 510:

"The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. * * * By the common law the riparian owner on a stream not navigable takes the land to the center of the stream, and such owner has the right to the use of the water flowing over the land as an incident to his estate."

And at page 512:

"But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor."

The Court, further speaking of the rights so acquired in the public domain, quoted the following language from the case of *Irwin vs. Phillips,* 5 Calif., 140:

"Among these the most important are the rights of miners to be protected in their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that without any specific legislation conferring or confirming them, they are alluded to and spoken of in various acts of the Legislature in the same manner as if they were rights which had been vested by the most distinct expression of the will of the law-makers.

"This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866."

Mr. Justice Van Devanter, while on the bench of the Circuit Court of Appeals of the Eighth Circuit, in the case of *Snyder vs. Colorado Gold Dredging Co.*, 181 Fed., 62, rendering the opinion of that Court, at page 68, said:

> "The several congressional enactments, whereby the local customs, laws, and decisions of courts relating to rights to the use of water *have been recognized and sanctioned*, disclose a settled purpose to make the subject one of local law, as respects the public lands and claims thereto under the public land laws."

Other authorities have held it a grant with respect to the right of appropriation of water from the general government.

> Cottonwood D. Co. vs. Thom, 39 Mont., 115, 118.
> Union Co. vs. Ferris, 2 Saw., 176, 184, F. C. 14371.
> Wood vs. Etiwanda W. Co., 122 Calif., 152, 158.
> Morgan vs. Shaw, 47 Ore., 333, 337; 83 Pac., 534, 535.
> Barkley vs. Tieleke, 2 Mont., 59, 64.
> Smith vs. Denniff, 24 Mont., 20, 21.
> Monte Vista Co. vs. Centennial D. Co., 22 Colo. App., 364, 370.

> "The grant is, in the Act itself, the highest kind of a patent."

> Weil on Water Rights, 3rd Ed., p. 180.
> Yale, Mining & Water Rights, p. 380.

This grant ran to private consumers, not to the State, and their right became vested not by virtue of any constitutional provision of Colorado, but by virtue of compliance with the local statutes, rules and regulations.

The grant contained in this Act of Congress is the only grant to be found upon the Statute Books. The Court may well take judicial notice that in 1866 the land through which the Republican River and its tributaries flowed was a part of the public domain of the United States, and in fact practically all of the lands in Colorado now utilized as agricultural lands was public domain, and that the grant contained in the Act of Congress applied to practically all of it. Subject to this grant, not only were the lands patented, but the constitution of Colorado adopted.

The United States, by its Congress having taken action upon a subject peculiarly within its jurisdiction, absolutely

precludes any subsequent action by the State which in any manner interferes therewith.

Construing the Act of 1877, the Court, in *Gutierres vs. Albuquerque,* 188 U. S., 545, 553, held that it constituted a grant.

> "The right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, was granted." * * *

In connection with the Congressional Act of 1866 there should also be considered the later Acts of Congress in respect to the disposition of public lands and the waters thereof.

The Act of March 3, 1877 (19 Stats., 377); joint resolution of Congress of March 20, 1888 (26 Stats., 618); the Act of Congress of Octiber 2, 1888 (26 Stats., 526); the Act of Congress of August 30, 1890 (26 Stats., 391), and the Reclamation Act of June 17, 1902 (32 Stats., 388), all to the effect of an intent on the part of Congress to reserve to the United States full right and power of disposition of the waters of the public domain.

> Gutierres vs. Albuquerque L. Co., 188 U. S., 545, 554.
> Winters vs. United States, 207 U. S., 564, 577.
> Green vs. Willhite, 160 Fed., 755, 757.

Congress likewise in the Forest Reserve Acts (30 Stats., 34), again permitted the appropriation of waters in all forest reservations for domestic, milling and irrigation purposes under the laws of the State where located. But we contend that the Act of July 9, 1870 (16 Stats., 217, 218), amounts practically to a Congressional construction in itself of the Act of 1866. That Act provides:

> " 'All patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the ninth section of the Act, of which this is amendatory.'

We direct particular attention to the language:

> " 'Such water rights * * * as may have been acquired under or recognized by the ninth section of the Act of which this is amendatory.' "

Congress by the use of this language has divided the water rights which the government had in 1866 pledged itself to protect into two kinds of water rights. First, those water rights as may have been acquired under the ninth section of the Act of 1866. Second, those water rights as may have been recognized by the ninth section of the Act of 1866. There is a clear distinction between the meaning of the expressions "acquired under" and "recognized by" as used in this statute.

The first class of "water rights * * * as may have been acquired under * * * the ninth section of the Act of which this is amendatory," are water rights acquired after July 26, 1866.

The second class of "water rights * * * as may have been * * * recognized by the ninth section of the Act of which this is amendatory," are water rights asserted and used before July 26, 1866.

The Act of 1866 was passed, as is shown by the history of the same, not only to provide for the acquiring of water rights in the future, but also to quiet the title of the large number of water claims asserted and used between the years 1849 and 1866 by individuals who were technical trespassers on the public domain. But since 1866 water rights can only be "acquired under the ninth section of the Act" of July 26, 1866. Congress itself by its amendatory Act has declared the Act of 1866 to be also prospective in its operation; and separates its waters from its lands.

THAT THE UNITED STATES NOT ONLY OWNED THE LAND, BUT THE BENEFICIAL USE OF THE WATER, IS RECOGNIZED BY ALL WESTERN STATES, INCLUDING COLORADO.

Judge Hallett said, in *Reynolds vs. People*, 1 Colo., 179, 181:

> "The body politic (Colorado territory) thus created is not a sovereignty, but an emanation of Federal power, standing upon and subordinate to the authority of the general government. Itself the creature of the Federal government, a territory cannot transcend the power of its superior, nor can the authority of the territory be arrayed against that of the general government."

Again Judge Hallett said, in *Yunker vs. Nichols,* 1 Colo., 551, 554:

> "All the lands in this territory which are now held by individuals were derived from the general government, and it is fair to presume that the government intended to convey to the citizens the necessary means to make them fruitful (water)."

So that—during territorial times, at least—there was no transfer by the Federal government of water or water rights under the act creating the territory.

After the admission of Colorado as a State the same doctrine is adhered to. In *Coffin vs. Left Hand Ditch Co.,* 6 Colo., 443, 446, the Court said in 1882:

> "The right to water in this country, by priority of appropriation thereof, we think it is, and always has been, the duty of the national and state government to protect. The right itself, and the obligation to protect it, existed prior to legislation on the subject of irrigation. It is entitled to protection as well after patent to a third party of the land over which the natural stream flows, as when such land is a part of the public domain; and it is immaterial whether or not it be mentioned in the patent and expressly excluded from the grant."
>
> "The Act of Congress protecting in patents such right in water appropriated, when recognized by local customs and laws, 'was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one.' *Broder vs. Natoma, W. & M. Co.,* 11 Otto, 274."

Thus in the Coffin case, the Supreme Court six years after the adoption of the Constitution of Colorado, quotes with approval the statement of this Court, that the right of appropriation was a right existing prior to 1866. Admitting that the right existed prior to 1866, there was no right or title in the water upon which the alleged claim of the Colorado Constitution could operate ten years later. If the right existed prior to 1866 it was not the subject of grant in 1876. If it was a right so universal and imperious that it claims the recognition of the law (Yunker vs. Nichols, 1 Colo., 551, 553), or as said in *Shilling vs. Rominger,* 4 Colo., 104: "This right arises *ex necessitate rei,* and hence the suit may be regarded as declaratory merely of the law of necessity," then the right

mounted higher than the Statutes of Colorado or its Constitution or even the Acts of Congress.

Whatever view may be taken of the origin of the right of appropriation of water, whether it arises by the law of necessity or by permission or grant by Congress, the claim of ownership by the State of Colorado is equally without merit and the claim of title must be rejected and Colorado's control over the waters limited to the right of sovereignty, and a policing power.

In *Mohl vs. Lamar Canal Co.*, 128 Fed., 776, Judge Hallett again had occasion to discuss the origin of title to the use of water for irrigation, and at page 778 said:

> "The waters of flowing streams are *publici Juris* * * * the gift of God to all his creatures."

Judge Hallett further held:

That Section 5 of Article XVI of the Colorado Constitution means no more than the Acts of Congress of 1866, and it is in terms a recognition of the existing right; that it constituted an enlargement of the common law respecting the use of water, but that it did not constitute a grant by the general government to the state government, properly construed Section 6 of Article XVI of the Colorado Constitution, to-wit:

> "The right to divert unappropriated waters of any natural stream for beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose,"

meant no more than the Act of Congress of 1866:

Then said, page 779:

> "In the language of the Supreme Court it is 'a recognition of a pre-existing right of possession' rather than the establishment of a new one.
>
> "One who diverts waters from a flowing stream for a beneficial purpose may have the use of it so long as he conforms to the law regulating such matters, but he has no contract with or grant from the government, federal or state, in respect to his privilege."

In *Wyatt vs. Larimer & Weld Irr. Co.*, 1 Colo. App., 480, 497.

> "The history of water rights in this state will show that the rights and principles declared in the

> constitution were recognized and acted upon by the people years before they were formulated and declared in that instrument. That such rights had their inception in the earliest attempt at agriculture, when it was found that climatic conditions demanded the artificial use of water to produce crops. The title of the public and the people to the water in the streams, and the right to divert and appropriate, were recognized and acted upon, the only requirement being an application to a beneficial use, and such rights to the use of water as between different consumers or users were established upon the broad equitable basis that preferences were to be controlled by the respective dates when the conflicting appropriations were made."

While this case was reversed by the Supreme Court (18 Colo. 298) it was upon other grounds.

In this connection, we desire again to call the Court's attention to the case of *Larimer County Reservoir Co. vs. People*, 8 Colo., 614, 618, and the language there used by the Court:

> "While the legislature cannot prohibit the appropriation or diversion of unappropriated water, for useful purposes, from the natural streams upon the public domain, that body has the power to regulate the manner of effecting such appropriation or diversion. It may, by reasonable and constitutional legislation, designate how the water shall be turned from the stream, or how it shall be stored and preserved."

That language is the sum total of the right of Colorado in and to the waters of its natural streams, it is solely as there defined, police power, and that is the extent of the power of Colorado to enact "*constitutional legislation*" with respect to water. If the legislature cannot prohibit the appropriation of unappropriated water by constitutional legislation, by what power or authority can the State of Colorado prohibit the appropriation and diversion of water within the state for the irrigation of lands under one and the same ditch, all adjoining and in one body, but which happen to be divided by the artificial line fixed by Congress as the boundary between the sovereign jurisdictions of Colorado and Nebraska. The constitution does not prohibit it, in fact there cannot be found either in the constitution or in the statutory laws of Colorado any limitation as to the place of use until the act of the legislature in 1917 (Laws 1917, page 539), but which act under the

constitution of Colorado cannot be retroactive and therefore has no effect upon this suit, or the rights here sought to be enforced by the appellee, because the rights here asserted were asserted by suit long prior to the enactment of that statute. We might say here parenthetically, that the legislature of Colorado at the same session made an appropriation of $50,000.00 to defend this and other like suits but which appropriation was cut by veto to $37,500.00.

No more could the legislature prohibit the appropriation or diversion of unappropriated water from those portions of the stream where the riparian lands had passed to private ownership. If the sovereign right of Colorado could by any peradventure be extended or enlarged to embrace the ownership in fee of the waters, such ownership would apply alike to the public streams throughout their entire course. It is our contention that these decisions of Colorado rendered at a time prior to any controversy concerning the ownership of the unappropriated water and at a time when the people of the state were uninfluenced by any motive of self-interest, lends to these decisions a greater weight than to the later decisions, when the water has practically all been appropriated and its value become of supreme importance to the state.

In the case of *Platte Water Co. vs. Northern Colorado Irrigation Co.*, 12 Colo., 525, the territorial Legislature of Kansas had granted to the Capitol Hydraulic Co. the exclusive right to the use of all the water in the South Platte. After the organization of Colorado into a territory its Legislature changed the name to Platte Water Company. Under the Acts of 1879 and 1881 of the General Assembly of Colorado, providing for the adjudication of water rights in Colorado, the Platte Water Co. joined in a suit in which its rights were adjudicated together with the rights of the Northern Colorado Irrigation Co., which latter company's ditch was not completed at the time of the adjudication. The Platte Water Co. appealed from the decree, contending that under its articles of incorporation, and the rights granted to it by the Territorial Legislature of Kansas, it had the right to the exclusive use of all the waters in the Platte River, to the exclusion of the Northern Colorado Irrigation Co. In passing upon this question the Court held that if the Platte Water Company claimed a right to use the water which it had not applied to a beneficial use, it must be by some law superior to that of Colorado; that the common law did not aid it. At page 532 the Court said:

> "At common law the right to divert the water of a non-navigable stream might be granted, to a certain extent, by the proprietor of the soil through which

> the stream runs. *But in the controversy under consideration such proprietor was the United States, and appellant shows no grant from such proprietor.*"

The Court then held that the Act of the Territorial Legislature of Kansas conferred no authority or power whatever upon the Platte Water Co., nor did the Act of the Territorial Legislature of Colorado; further, that the case of *Broder vs. Water Co.*, 101 U. S., 274, was decisive of the controversy, which case held in effect that "the Act of 1866 was a voluntary recognition by Congress of the United States of the pre-existing rights of those who, by priority of possession, had constructed canals and ditches to be used in mining operations and for the purpose of agricultural irrigation, where such artificial use of water was an absolute necessity." In applying the doctrine of that case, the Court said, page 533:

> "Though your charter from the territory of Kansas was ineffectual to convey an exclusive right, or perhaps any right to the waters of the South Platte River, according to the rule of common law, yet according to the local customs, laws and decisions of the courts of Colorado you are entitled to protection to the extent of your actual appropriation."

It is thus distinctly recognized by the Supreme Court of Colorado that the title of all the waters of the natural streams of the State originally vested in the United States.

In *Armstrong vs. Larimer County Ditch Co.*, 1 Colo., App., 49, 57, the Court said:

> "The right to water by prior appropriation was recognized by the first Legislature of the territory (see Laws, 1861, p. 67), and such rights continued to be recognized during the entire territorial existence. *The general government, in which was the fee to both land and water,* at the time of the settlement, and for many years after, acquiesced in the disposition of the water according to local customs, and in July, 1866, passed an act in which it provided, etc."

Another case in Colorado which is conclusive against the state with respect to the ownership of water, is that of *Hartman vs. Tresise,* 36 Colo., 146. The Legislature of Colorado, in 1903, passed an act providing: "That the public shall have the right to fish in any stream in this state, stocked at public expense, subject to actions in trespass, etc." Tresise

was sued by Hartman for trespassing upon his land. The trespass consisted in fishing in a non-navigable stream stocked by Colorado. The trial Court, in announcing its decision, after quoting the Constitution of Colorado providing for the public ownership of waters, said, at page 149:

> "The ratification of this Constitution by the United States Government amounted to a declaration on the part of the government that the state should have a perpetual easement over the public lands of the United States for the natural streams contemplated by the Constitution, of which these streams were a part, and that all persons acquiring a part of the public domain acquired the same subject to this constitutional provision and this right of the state." Of this, the Supreme Court said:
>
> "*The conclusion reached by the trial Court is not tenable.* The section of the Constitution relied upon declares the unappropriated waters of our natural streams to be the property of the public, and dedicates the same to the use of the people of the state subject to appropriation as in that instrument provided; and the following section provides that the right to divert the same to beneficial uses shall never be denied. *It is this right of appropriation which the general government has recognized and confirmed, and subject to which its grants of public lands in the arid states since 1866 have been made.* But neither in this nor in any other clause of our Constitution, nor in any Act of Congress, is the right of fishery in the natural streams of this state, or an easement over the public domain for its enjoyment, declared to be, or recognized as vested in the state; nor has any authority to grant the same to its citizens been conferred upon the state, or claimed by it, except in the statute cited. This does assume to grant such right, and it is upon this alone, if at all that the defendant can justify. That this act is void for at least two reasons, we proceed to show.
>
> "If the state, when formed, might have exercised authority in disposing of the public domain therein situate, it was relinquished, for, in our Enabling Act, 1 Mills' Ann. Stats., pages 90, 91, 109, it was specifically provided, as one of the conditions precedent to the right of the people of our territory to form a state, that they should, and complying therewith they did, by irrevocable ordinance, disclaim all right and title to public lands within the territory,

and expressly recognized the exclusive right of Congress to dispose of the same. That Congress has such exclusive right has been expressly decided. *Wilcox vs. Jackson,* 13 Peters, 517.

"When our Constitution was adopted, the United States owned the lands, which after the ratification, it conveyed to the plaintiff.

"*Whatever rights and titles therein it owned passed to the plaintiff, unless excepted or reserved in the instrument of conveyance, or by some Act of Congress.* Plaintiff took and held the same, subject, of course, to the right of appropriation just noted, and he holds it subject, also, to the state taxation laws, the laws of eminent domain and other statutory regulations, to which the owners of all property are amenable. *But the power of the state is not so comprehensive as to enable it, without compensation to the owner of lands, to take any part of them from him and give them to another citizen, and no Act of Congress authorized,* nor did plaintiff's patent contain, any reservation of any public right of fishery, or of any easement over his lands to enable the public to enjoy such right."

The effect of the above language of the Supreme Court of Colorado is realized, when the dissenting opinion of Mr. Justice Bailey is taken into consideration. The dissenting opinion, at page 162, defines public property to be "that which is dedicated to the public use and over which the state exercises control and dominion." The argument is that under the Constitution of Colorado, if the state owns the water it necessarily must have some right in the bed of the stream. The majority opinion held (page 151), that the owner of land bordering on a non-navigable stream, owns to the center of the stream, and if he owns the land on both sides, he owns all of the stream.

Justice Bailey further says in the dissenting opinion (page 164):

"When by the Constitution the water of the natural streams of the state was declared to be the property of the public and was dedicated to the use of the people, there was also dedicated to their use a right of way through the channel of every natural stream of the state, because such right of way is a necessary incident to the full and complete use and enjoyment of the grant, and no private ownership can defeat such right of way.

> "The legislation of this state has always assumed not only public ownership of the water, but also the right to direct and control the use of the channel or bed of the stream.

Again, at page 166, he says:

> "It is asserted that this act is in violation of Sec. 15, Art. II of the Constitution, in that it is an attempt to take property without due process of law. I fail to see the force of this assertion. The same Constitution provides that these streams are public, the waters are dedicated to the use of the people, and, as we have seen, if the streams themselves are public and the water belongs to the people, the people have the right in the bed of the stream for all purposes, not inconsistent with the constitutional grant. * * * In the opinion of the majority of the Court it is stated that this land was filed upon and taken subsequent to the adoption of the Constitution, and therefore it was taken subject to the constitutional provisions, and, if that is true, the right of way in the bed of the stream never did belong to the proprietor of the estate, except subject to the right of the public, and inasmuch as it never belonged to the plaintiff, it could not be taken from him."

It is thus seen by the argument of the dissenting opinion, what was the effect and extent of the majority holding of the Court. The dissenting opinion is based fairly upon the constitutional provisions of Colorado, but the majority opinion having in mind the fact that the United States was the owner of all the public domain, including the water and bed of natural streams, and no grant having been made by Congress, either directly or indirectly, to the state, it had no right or authority by its Legislature to grant an easement or right of fishery in any such non-navigable stream. If fishery was not granted water most assuredly was not.

"Fishery" has always been held to be an incident to riparian ownership. It is in every sense essentially of the same character of property as a usufructuary right in water. The statute was held void because Colorado never obtained a grant of the right of fishery in the stream of Colorado from the Federal government. It never received a grant of anything else with respect to the water.

IF THE FISHERY STATUTE OF COLORADO OF 1903 IS VOID BECAUSE IT INFRINGES UPON THE RIGHT OF DISPOSITION BY CONGRESS OF THE PUBLIC DOMAIN, THEN FOR THE SAME REASON SEC. 5, ART. XVI, OF THE STATE CONSTITUTION, IS VOID—A LIKE PREMISE AND A LIKE REASONING DEMANDS A LIKE RESULT.

The Supreme Court, as late as 1909, in *Sternberger vs. Seton*, 45 Colo., 401, 403, defers to the rights of the Federal Government with respect to the disposition of water within the State of Colorado, and the Court of Appeals, in *Monte Vista Co. vs. Centennial Co.*, 22 Colo. App., 364, 370, quoting from Weil on Water Rights, says:

> "'A water right of appropriation is real estate independent of the ditch for carrying the water. and independent of ownership or possession of any land, and independent of place, or use or mode of enjoyment, *whereby the appropriator is granted by the government the exclusive use of the water anywhere so long as he applies it to any beneficial use.*'"

The courts of Colorado having thus spoken in no uncertain terms as to the source and origin of the right of appropriation in water, to now approve of the contention that because of the construction placed upon its Constitution that it owns the water, would be to overturn all of these decisions of the Supreme Court of Colorado, and to reverse what has been heretofore shown to be a public policy of the State adhered to since Territorial days, and a rule of property in Colorado.

Whatever might have been the construction placed upon the claim of title of Colorado to the waters of its natural streams had the present day contention in relation thereto been originally made, it is now foreclosed by the decisions of its own court of last resort.

Other Western States by their courts of last resort admit that the United States was and is the source of all title, and particularly to water. Likewise local Federal courts have spoken in no uncertain terms with respect to this same contention.

In *Union Mill and Mining Co. vs. Ferris et al.*, 2 Saw., 176 (F. C. 14371), Circuit Judge Sawyer and District Judge Hilyer said of the Congressional Act of 1866 (24 F. C., 594, 595, 597):

> "It is also claimed that the Act of Congress of July 26, 1866, confirms the right of the defendant,

acquired by priority of appropriation. We consider it to be entirely clear that before the title to these lands was acquired from the government of the United States no occupancy or appropriation of the water by either party, no state or territorial legislation, or rule of decision established by the state courts in controversies between occupants of the public land, without title from the government, can in any manner qualify, limit, restrict or affect the operation of the government patent; that the government has a perfect title to the public land and the absolute and unqualified right of disposal; that a stream of running water is a part and parcel of the land through which it flows, inseparably annexed to the soil, and the use of it as an incident to the soil passed to the patentee, who can be deprived of it only if it is the policy of the law to presume a grant; that the government, as proprietor of the land through which the stream of water naturally flows, has the same property and right in the stream that any other owner of land has, be it usufructuary or otherwise, and that a statute of limitations does not run against the United States.

"Upon the foregoing propositions it is not deemed necessary to enlarge. They seem incontestible, and we shall content ourselves with a reference to the case of *Van Sickle vs. Haines*, 7 Nev., 249, wherein the authorities are collected and the law stated in the clearest and most satisfactory manner, and in the case of *Gibbons vs. Chouteau*, 13 Wal., 93. In *Van Sickle vs. Haines* the Court held: that the United States is the absolute and unqualified proprietor of all the public land to which the Indian title has been extinguished; that running water is primarily an incident to the ownership of the soil over which it naturally flows; that the government patent conveys to its grantee not only the land through which the stream naturally flows, but also the stream; *that neither territorial nor state legislation can in any wise impair or modify the right of the government to the primary disposal of the soil.*

"* * * After examination we are constrained to say, in the language of Mr. Justice Garber, in that case, that *not only the weight of authority, but all the authorities,* SUPPORT THESE PROPOSITIONS."

Again, the Court said:

> "The courts not applying in all respects the doctrine of the common law respecting the riparian owners, in deciding between these possessors, none of whom had title to the soil, *recognized a species of property in running water* and held that he who first appropriated the waters of a stream to a beneficial purpose had, to the extent of his appropriation, the better right as against persons subsequently locating on the stream above or below."

And again, referring to the Congressional Act of 1866:

> "Under this law, when a possessory right to the uses of waters is claimed, whether or not such right exists, will be determined by reference to the local customs, laws and decisions, and the question will be determined just as it would have been had it been raised between occupants before the title to the land had passed from the government. *When the right is thus ascertained the statute has the force of confirming it to the person entitled under the local laws and decisions;* but the Act is prospective in its operation, and cannot be construed so as to divest a part of the estate granted before its passage."

That decision was rendered in 1872, within six years of the passage of the Act, and bears out our contention to the effect that the ownership of the usufructuary right in water belonged originally to the United States, that it could be acquired under the authority of the Act of 1866 by simply complying with local laws and decisions, and that no legislative act or constitutional fiat of a state or territory could divest the government of any right connected with its ownership of the water on the public domain. This usufructuary right of water is now of greatest value in this western country.

Going back again to the case of *Irvine vs. Marshall*, 20 How., 558, the Court further said (page 566):

> "Now, if it were competent for a State Legislature to say that notwithstanding this the title shall be deemed to have passed, the effect would be, not that Congress had the power of disposing of the public lands and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the laws of Illinois

> paramount to those of Congress in relation to a subject confided by the Constitution to Congress only, and the practical result in this very case would be by force of state legislation to take from the United States their own lands, against their own will and against their own laws. We hold the true principle to be this: *That whenever the questions in any Court, State or Federal, is whether the title* to land which was once the property of the United States, has passed, THAT QUESTION MUST BE RESOLVED BY THE LAWS OF THE UNITED STATES."

It must therefore be conceded that unless the State of Colorado can produce a patent, or some Congressional Act of dedication, the title to the use of water never passed to the state, but passed to the patentee of the United States; that as to whether or not the title passed from the United States must be measured and resolved by the laws of the United States, and not by the laws of the State of Colorado.

The decision of the Supreme Court of Nevada in *Van Sickle vs. Haines,* 7 Nev., 249, cited in *Union Mill and Mining Co. vs. Ferris, supra,* contains an exhaustive review of the common law riparian rights, and holds that a riparian right is incident to the soil, and, as said by some courts, as much a part of the soil as the stones or the trees upon it. At page 268 the Court said:

> *"Upon what principle can it be contended that the United States, which is the source of all title, which has as complete and absolute an ownership to the soil as can possibly be acquired, does not, like the owners of land, possess this most inseparable incident to it?"*

Again, at page 273, the Court said:

> "It is assumed as if it were a matter of course that the United States is incapable of making use of the water of small running streams; and from that, conclusion is at once reached that it can have no right to it. The premise, it will be observed, is not that the United States *has* not, but that it *is incapable* of making use of a stream."

The Court then goes on to show that it is not a question of use, but simply a question of ownership. At page 275 it is said:

> "But, it is argued, if the United States ever had any right to the stream in question, it parted with it, and authorized the respondent here to make the diversion complained of prior to the time it conveyed the land, over which its natural course lay, to the appellant, and consequently that the patent to Haines did not convey the right to the water. This result is arrived at in this way: The territory of Utah, of which this state formed a part, was authorized by Congress to enact appropriate legislation for the territory; but all the laws passed by the legislative assembly of the government were required to be submitted to it, and if disapproved they should be null and of no effect. It is said that the effect of this delegation of power was to make all the enactments of the Legislature of Utah as authoritative and binding as if they originated with and were passed by Congress itself; and therefore that the United States authorized and sanctioned the diversion made by Van Sickle, and that the government is bound thereby. * * * But independent of this, there are two other conclusive answers to this position. First, the acts in no wise authorized the diversion of water as was done in this case, and, second, if they did so they were in direct conflict with the provision of the organic law, which inhibited it from interfering with the primary disposal of the soil, and were for that reason utterly void."

We might say here, parenthetically, that the territory of Colorado in 1861 passed an Act providing for the diversion and appropriation of water for mining, agricultural and other uses. Its organic act, like that of Utah, provided (Sec. 6, Organic Oct):

> "but no law shall be passed interfering with the primary disposal of the soil."

So that the effect of the territorial act of Colorado, if it be construed to confer title, was of no effect insofar as it disposed of any of the public domain or property rights incident thereto, and the right of diversion of water was only recognized five years later by an Act of Congress, which validated appropriations made in conformity with the local laws and customs.

Speaking of this phase, the Court further said, at page 278:

> "The Organic Act of Utah declared that the Legislature should pass no law interfering with the primary disposal of the soil in the territory. Now, as we have shown that a natural water course is an incident to the land, in fact a part of the soil, in the language of some of the cases, it is clear that no act of the Legislature of Utah would be valid which in any way attempted to confer any right to the water of the streams on public land."

The case of *Van Sickle vs. Haines*, so far as it adopted and applied the strict rule of common law riparian rights in the State of Nevada, has been overruled by subsequent cases in that State, but the question of primary ownership has not been modified, nor the effect of that decision destroyed.

The Supreme Court of Montana, in *Story vs. Woolverton*, 31 Mont., 346 (78 Pac., 589), said:

> "Prior to the time of settlement upon the lands in question, and prior to the appropriation of the waters of Bear Creek by any one, *both the land and the water were the property of the government.* When the government established the reservation it owned both the land included therein and all the water running in the various nearby streams, to which it had not yielded title. *It was, therefore, unnecessary for the government to 'appropriate' the water. It owned it already. All it had to do was to take it and use it.*"

In *Hough vs. Porter*, 51 Ore., 318 (98 Pac., 1083, 1091), the Supreme Court of that State said, page 389:

> "The right of the government to dispose of its public lands and to deal with all rights incident thereto in such manner as it may deem best, has long been fully established and recognized by all decisions upon the subject. True, it cannot by legislation determine for any state after its admission what the local laws relative to riparian rights shall be (*U. S. vs. Rio Grande Irr. Co.*, 174 U. S., 690, 703), but the general government, in dealing with its public lands, may provide for their transfer as might any other landed proprietor, *and make such reservations therefrom by grant, dedication, or otherwise, as it may see fit.* Riparian rights may become the subject of a grant or dedication, and may be severed from the

soil. *Coquille M. & M. Co. vs. Johnson* (Ore.), 98 Pac., 132. This principle is clearly and concisely stated in an opinion by Knowles, District Judge, in *Howell vs. Johnson*, C. C. 89 Fed., 556, 558, as follows: 'Being the owner of these (public) lands, it has the power to sell or dispose of any estate therein or any part thereof. *The water* (in question), *in an unnavigable stream flowing over the public domain, is a part thereof, and the national government can sell or grant the same or the use thereof separate from the rest of the estate, under such conditions as may seem to it proper.*' Decisions to the above effect are too numerous and too well understood to need extensive citation."

In another case in Oregon, *Nevada Ditch Co. vs. Bennett*, 30 Ore., 59 (45 Pac., 472, at page 484), the Court said, page 104:

"In the Pacific Coast States Congress has recognized the privilege of private citizens to acquire a usufructuary interest in waters of public streams, independent of riparian ownership. *This is but one way, however, of disposing of the public domain.* A new and peculiar right is carved out of it and settled upon private persons, either in their individual or corporate capacity. *Now, if such an estate may be carved out of the public domain for an individual, it may be reserved by the general government; but the waters of non-navigable streams are part of such public domain, and hence the property of the government,* which may lay hold of and use them without taking any of the steps made necessary to obtain a usufructuary interest therein by private individuals."

Again the Court of Appeals, in *Beaver Brook Co. vs. St. Vrain Co.*, 6 Colo. App., 130, held that the Act of Congress of 1866 was prospective in its operation, and that every purchaser of the public domain took his land subject to such rights therein as may have been theretofore vested under the Act of Congress, following the cases of *Union M. & M. Co. vs. Ferris, supra; Broder vs. Water Co.*, 101 U. S., 76; *Basey vs. Gallagher*, 20 Wall., 670.

In *U. S. vs. Conrad Investment Co.*, 156 Fed., 123. 129-30, it is said:

"The government has not to make a prior appropriation to enable it to obtain the use of water.

> It has only to take that which has been reserved or that which has never been subject to prior appropriation upon the public domain. *It has only to come into its own*" * * *.

This case was appealed to the United States Court of Appeals, Ninth Circuit, and is reported in 161 Fed., 829, where the case was affirmed on the authority of the case of *Winters vs. United States, supra.*

That construction of the Congressional Act of 1866 precludes any ownership in the State of Colorado of the waters of the public streams.

Kinney in his second edition on "*Irrigation and Water Rights*", Sec. 640, p. 1123, sums up his conclusions as to the source of title of water in the United States:

> "Our conclusions upon this subject are that the United States, as the original owner of all the land on the public domain, was also the owner of all the waters of the natural streams and other bodies flowing thereon."

By Acts of Congress the United States permitted the appropriation of waters and the separating from the absolute fee the waters, and subjected the right, to acquire title to the use of waters for irrigation, to the local usages, rules and customs of the various states. Under such Acts of Congress the title was permitted to be acquired by full compliance with such laws, etc. That the state, as a matter of sovereignty or jurisdiction, has the power to declare just what its laws governing waters shall be, whether the common law or whether the arid region doctrine shall apply.

> "The title to the use of the water in any case is deraigned from the United States to the individual, and the Colorado theory that it comes from the state is erroneous."
>
> 2 Kinney Irr. & Water Rights, Sec. 640, p. 1124.

The right of appropriation is still subject to the rights of the United States to preserve unimpaired the navigable rivers, and also its right as the owner of public lands bordering on a stream to the continued flow of its waters, so far at least as may be necessary for the beneficial use of the government's property.

If Colorado owned the waters, it could place a dike across every stream at the state line, and thus preclude absolutely the flow of any of the waters out of the state. This it cannot do, because it is not the owner; it does not own the public domain of Colorado, and the court must take judicial notice, at least of the extent of the Federal forest reservations in Colorado, and that there are vast areas yet remaining of the public domain, within its borders; that as a matter of fact the area of the forest reservation is practically one-third of the total area of the State of Colorado, and that those reservations are in the mountains, which are the source of all the natural streams of the state. That being the case, and these streams rising upon public lands, flowing for long distances through public lands, are yet, under the decision of *U. S. vs. Rio Grande Irr. Co., supra,* within the control of Congress, and the United States stills owns the usufructuary right in these streams.

If Colorado is the exclusive owner of water within its borders, then the expression of the Supreme Court in the *Kansas-Colorado case* (p. 114), to-wit: "It would seem that equality of right and equity between the two states forbids the interference with the present withdrawal of water in Colorado for purposes of irrigation," would be meaningless, and the Court without right at some future time to change the status of the water with a change in the equities.

If Colorado owns the water why is it that all government patents even to this day, include the exception required by Sec. 2340, U. S. Rev. Stats.? If Colorado's contention is correct then the writing of that exception since 1870 has been a waste of time and paper.

As the Colorado Court said in the *Hartman-Tresise case, supra:*

> "The United States never granted to Colorado a right of fishery," it ought also to say, 'There is no grant of water and we must forego our claim to ownership thereof.' "

In *Gibson vs. Chouteau,* 13 Wall., 92, 99, the Court said:

> "Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. NO STATE LEGISLATION CAN INTERFERE WITH THIS RIGHT OR EMBARRASS ITS EXERCISE, AND TO PREVENT THE POSSIBILITY OF ANY ATTEMPTED INTERFERENCE WITH IT, A PROVISION HAS BEEN USUALLY

INSERTED IN THE COMPACTS BY WHICH NEW STATES HAVE BEEN ADMITTED INTO THE UNION, THAT SUCH INTERFERENCE WITH THE PRIMARY DISPOSAL OF THE SOIL OF THE UNITED STATES SHALL NEVER BE MADE."

In the above cause it was attempted to set up occupation of the premises for a period of time required by the statute of limitations of the State of Missouri, to defeat the title of the patentee of the United States, and speaking further of the power of Congress to dispose of the public domain, the Court said, page 104:

> "That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent under state legislation, in whatever form or tribunal such occupation be asserted."

The State of Colorado is, therefore, barred from setting up any title of any character whatever, either in this tribunal or in any other, to any water rights, because it did not acquire title by grant or otherwise than by the mere assertion of title by its Constitution. By the provisions of the Colorado Constitution it could not, and did not, divest either the United States or private ownership of water rights, because it could not confiscate vested rights, and under other provisions of the Constitution it could not take private property for public purposes without compensation, and most assuredly the State never could, and never did, acquire any interest or right to the water upon the public domain of the United States.

The Court of Appeals of the Ninth Circuit, in *Burley vs. U. S.*, 179 Fed., 1, 12, said:

> "That the United States may, where the circumstances and conditions require it, reserve the waters of a river flowing through its public lands, for a particular beneficial purpose, was held by this Court in *Winters vs. U. S.*, 143 Fed., 740. This decision was affirmed by the Supreme Court of the United States in *Winters vs. U. S.*, 207 U. S., 564, where the Court said: 'The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied and could not be.' *U. S. vs. Rio Grande Dam & Irr. Co.*, 174 U. S., 690; *U. S. vs. Winans*, 198 U. S., 371. To the same effect was the decision of this Court in *Conrad Investment Co. vs. U. S.*, 161 Fed., 829, 831.

"In this connection the Supreme Court further said, in *United States vs. Rio Grande Irr. Co., supra,* page 703: 'Although this power of changing the common law rule as to streams within its dominion, undoubtedly belongs to each state, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream to the continued flow of its waters; so far, at least, as may be necessary for the beneficial uses of the government property; second, that it is limited by the superior power to the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States."

Judge Hallet recognized the same doctrine in the case of *United States vs. Morrison,* 203 Fed., 364, in restraining the defendant from diverting water from a ditch built for the purpose of irrigating Indian lands.

If the government can *reserve* water it is because it *owns* it. If it owns water in Montana and New Mexico it owned the water in Colorado. If the government did own it, Colorado *did not,* and does not now own it, although, as property which has been acquired by private owners from the United States, the state has jurisdiction over it as a sovereign, like any other property within its borders, but Colorado has not such jurisdiction as *owner.* As Colorado never did and does not now own the water, a suit against her officers is not a suit against the state, nor is it an interference with her sovereign rights as a state.

Because all the land bordering on a stream may have become vested in private ownership, it could not change the status of the water. The only logical sequence is that if the water was not appropriated under the act of 1866, prior to the government patent, the usufructuary right passed to the patentees of the government title with the land, and not to the state.

In *Mohl vs. Lamar Canal Co.,* 128 Fed., 776, Judge Hallet held that flowing water is not the subject of private ownership, but, like the birds of nature, light and air, is the common property of all; the private property of none until reduced to possession; that the Act of 1866 was but a recognition of a pre-existing right enlarging the common law in respect to the use to be made of water; that it was not a grant by the government or state government; that the Constitution of the state conferred no other or greater rights than the Act of 1866; that the right to divert water for irrigation only con-

fers that right so long as the appropriator conforms to the law regulating such matters.

That decision is in the general line of the decisions of the State of Colorado, and is written with the same idea as announced by the same judge while sitting on the Territorial Court, in *Yunker vs. Nichols*, 1 Colo., 551.

But as said in the case of *Irvine vs. Marshall, supra*, whenever the question arises as to what passed from the government by its grants, *that right must be resolved by the laws of the United States and not by laws of a state.*

THE RIGHT OF A STATE, WITH RESPECT TO RIPARIAN RIGHTS.

It is recognized in all of the cases that a state has the indubitable right to adopt whatever doctrine it may choose, with respect to riparian rights; to limit it to the common law doctrine, or to extend it.

This Court recognized that right in the *Rio Grande* case, 174 U. S., *supra;* it was recognized in the case of *Snyder vs. Colo. Gold Dredging Co.*, 181 Fed., 62, where the Court said, page 65:

> "In so choosing between these inconsistent doctrines, Colorado acted within the limits of her authority, first as a territory, and then as a state, and her choice was recognized and sanctioned by Congress so far as the public lands of the United States were concerned. (Citing authorities.) Congress also, by its first enactment upon the subject, now embraced in Rev. Stats., Sec. 2339, granted the right of way over the public lands for ditches employed in so appropriating and applying water to beneficial uses, and by another enactment, now embraced in Rev. Stats., Sec. 2340, declared that all patents subsequently issued for public lands should be subject to any vested rights to such ditches."

But this right of the state, which is recognized by the authorities, does not mean, that by mere dictum, a state may declare itself and thus become the owner of the water, but simply that the common law doctrine of riparian rights may be adopted or repudiated, as the conditions of the particular state demand. It simply recognizes the right of the state to prescribe the manner of appropriation, how it shall be evidenced, how it shall be made, and when it becomes a completed, vested right in the appropriator, as provided by the Act of 1866. That right is far removed from ownership in

the state, as declared by the Constitution. The exercise of the right of dominion over water rights is but the fulfillment of the provisions of Secs. 2339, 2340, Rev. Stats., U. S., to the effect that the right of appropriation shall be recognized by the Federal government, when the applicant has *made an appropriation of water in accordance with the terms of the statutes of the State of Colorado.* That is the distinction recognized in *Empire W. & T. Co. vs. Cascade T. Co.*, 205 Fed., 123, 127:

> "*With its supreme authority over the public domain, Congress could have prescribed any rule respecting the flow and use of water*, whether it conformed or not to the local customs, laws and judicial decisions, but a patentee does not impliedly succeed to all that might have been done. Nor is it correct to say that the title of the United States was as defined in the common law. On the contrary, it held the lands as a sovereign (this is contrary to the ruling of the Supreme Court in *Light vs. U. S.*, 220 U. S., 523, 536). Moreover, the common law of riparian ownership, in all its features, never obtained in Colorado. *Snyder vs. Dredging Co.*, 181 Fed., 62. It was unsuited to the region and would have tended greatly to prevent the very development which made the lands valuable. Express recognition of the local conditions and necessities is found in the acts of Congress above referred to, and in the patents from which complainant derives its title. See 174, U. S., 690. The national Constitution speaks in the terms of the common law, and that law has been qualifiedly adopted by statute in many states, but there has been no statutory adoption of it for the United States."

The ownership of the United States of the usufructuary right to water is impliedly, if not expressly, recognized in that language, and the Act of 1866 was simply a permission or a grant by Congress *to the individual, not to the State of Colorado,* to divert the water for irrigation from the natural streams of Colorado, contrary to the strict rule of common law. A number of courts have spoken of this statute as a grant, but whether a grant or whether it is a permission, the grant did not run to the state, but to private individuals.

Our contention here does not militate against any vested right of *private* ownership of water as now claimed, or the right of Colorado to administer her local laws respecting water, but is directed against the unfounded and illogical claim to soverign ownership to the exclusion of the United

States, the primary source of title and grantor of all water rights and the exclusion of all who have acquired rights to use water beyond her borders. We contend that all unappropriated water is now owned by the United States and all appropriated water by private persons. There is not now and never has been any ownership by the State.

RIGHTS ON AN INTERSTATE STREAM.

The question of appropriation of water from interstate streams for irrigation in the different states has been frequently before the courts and in every instance, without an exception, the decision has been that state lines do not affect the right any more than section lines; and these cases have been decided under the laws of practically every irrigation state, including Colorado.

One of the first decisions upon that subject is *Howell vs. Johnson*, 89 Fed., 556, where a citizen of Wyoming brought a suit against a citizen of Montana to restrain the diversion of water from an interstate stream. The plaintiff owned a water right acquired under the laws of Wyoming, and it was contended that he could not apply to a Federal Court in Montana to enforce that right, and, further, that rights pertaining to water were under the control of the legislative power of Montana.

All of these cases upon interstate water rights pertain as well to the jurisdiction over the subject matter—another point raised by appellants. It was further contended that as the water right was acquired under the laws of Wyoming, it could only be enforced as against citizens of that state, not against citizens of Montana, who only diverted water in that state. As the Court put the question: "Is the right claimed by plaintiff one which accrues only by virtue of the laws of Wyoming?" the answer to which again brings up the entire subject of the origin of water rights.

In that case, as in the case at bar, both states recognized the right to divert water for irrigation. After referring to Secs. 2339 and 2340, U. S. Rev. Stats., the Court said, page 558:

> "*The legislative enactment of Wyoming was only a condition which brought the law of Congress into force.* The national government is the proprietor and owner of all the land in Wyoming and Montana which it has not sold or granted to some one competent to take and hold the same. Being the owner of those lands, it has the power to sell or dispose of any estate therein or any part thereof. The water in the unnavigable stream, flowing over the

public domain, is a part thereof, and the national government can sell or grant the same or the use thereof separate from the rest of the estate under such conditions as may seem to it proper."

In the case at bar a compliance with the laws of Colorado and Nebraska was, as said by the Court in the above cause, "*Only a condition which brought the law of Congress into force.*" Both states recognizing the right to divert water, a compliance with the laws of each state was all that was necessary to enable parties to appropriate and divert the waters. The Court then quotes from Black's Pom. on Water Rights, Sec. 32, and also refers to *Mining Co. vs. Ferris,* 2 Saw., 176, and then says:

> "The Federal Government is not restrained in the disposal of its lands by state laws or state lines. Its laws upon this subject apply to the lands in one state as well as another. It has made grants of land extending through several states. The state governments cannot restrict it in the primary disposal of its lands. If it may sell and dispose of its land as it may deem proper, there is no reason why it may not sell a part thereof as an incident thereto, *such as the use of water flowing over the same.* That it has the same right as any real estate proprietor would be as evident. It is apparent then, according to the allegations of the bill, that plaintiff acquired rights by appropriation in Sage Creek, to which all who have acquired land upon the same or water rights therein, subsequent to his appropriation, must be subordinate. His rights have the sanction of the national government.
>
> "It is urged that in some way the State of Montana has some right in these waters in Sage Creek, or some control over them. *It never purchased them. It never owned them.*"

After referring to cases respecting the rights of states over the navigable streams and lakes, the Court further said:

> "In that case it was not held, nor was it held in any of the cases cited in the decision therein, *that the rights of the owner of land through which any unnavigable stream flowed within the boundaries of any state depended upon the laws of such states, or that said owner's right to the waters depended upon*

such laws, as against one who claimed the right to do the same under the laws of Congress. To so hold would uphold the view that the state might interfere with the primary disposal of the land of the national government. When a party has obtained title to property from the national government, the state government has no right to destroy that title, except under the power of eminent domain. The State of Montana cannot step in and say 'the right to the water of Sage Creek which the plaintiff acquired under the laws of Congress, he cannot exercise in this state'. This would be the taking of plaintiff's property from him without due process of law. It is a recognized rule of law that a person who has appropriated water at a certain point in a stream is entitled to have so much of the waters of said stream as he appropriated, flow down to him to the point of his diversion."

Again, in the case of *Cruse vs. McCauley,* 96 Fed., 369, speaking of water rights, the same Judge said, page 373:

"It must be conceded that the United States as the proprietor of the land over which the south fork of McDonald Creek flowed, had a right to the flow of the waters thereof over its land, as an incident thereto. In the eastern part of Montana the United States acquired its title to lands by virtue of what is called the 'Louisiana Purchase'. There cannot be one rule as to the right to the flow of water over its lands in Montana, and another rule as to its lands in Iowa and Missouri. In these last named states there can be no doubt of the rule that the national government would be entitled to water which is an incident to its land. *As the United States, then, owns the waters which are an incident to its lands, it can dispose of them separate from its lands, if it chooses."*

The Court then cites Sec. 2339, Rev. Stats., and proceeds:

"The practical construction of this statute has been that as long as land belonged to the United States the waters flowing over the same were subject to appropriation for any of the purposes named, when such appropriation was recognized by the local customs, laws or decisions of the courts, but if the water was not so appropriated when it flowed over the public domain, it was not subject to appropriation

> after the land over which it flowed became private property. Patents of the United States to lands contains this clause: 'Subject to any vested and accrued water rights for mining, agricultural, manufacturing or other purposes, etc.' Certainly this means subject to such water rights as existed at the time when the patent took effect. * * * If a person receives a patent from the United States for land, subject only to accrued water rights—that is, existing water rights—and as an incident to or a part of this land there is water flowing over the same or upon the same, he would have all the rights the United States had at that time. I do not think any state law or custom can take away such rights, except for some public purpose."

The late Judge Hallett, in *Hoge vs. Eaton,* 135 Fed., 411, 415, with respect to water of a stream arising in Colorado and flowing into Wyoming, held that the state line practically had no more effect upon the rights to divert water than section lines. The late Gov. Eaton sought to divert all the water in Colorado, regardless of acquired water rights under the laws of Wyoming upon the same stream. Of this Judge Hallett said:

> "It is enough that complainants and their grantors were in the possession and enjoyment of the water a long time prior to respondents' diversion, and therefore the first appropriators under the law of the land as understood in Wyoming and Colorado."

In *Anderson vs. Bassman,* 140 Fed., 14, the question determined was the right to the use of water of an interstate stream. It was first objected that the Court had no jurisdiction, "in that it is asking the Court to pass upon titles to real property in another state". The Court held, in conformity with the decision in *Howell vs. Johnson,* 89 Fed., 556, and *Morris vs. Bean,* 123 Fed., 618, at page 20, said:

> "One who has acquired a right to the water of a stream flowing through the public lands, by a prior appropriation in accordance with the laws of the state, is protected in such rights by Secs. 2339 and 2340, Revised Statutes, as against subsequent appropriators, though the latter withdraw the water within the limits of a different state. This holding was based upon the distinction between the control of a

> state over the waters of navigable and unnavigable streams within its boundaries. The waters in question were a part of an unnavigable stream, *the title to which was never acquired by either state, but remained in the Federal government.*"

And after citing from the authorities, the Court said, page 24:

> "It follows from these authorities and others that might be cited, that whether the water is taken from the stream in California by the riparian owner, for the purpose of irrigation, or is taken from the stream in Nevada, by the appropriator, for the same purpose, the right is equally sanctioned by law and is subject to the same limitations; that is to say, the right to use the water from the stream for irrigation purposes in either state, under either right, must be a reasonable use to be determined by the circumstances of each case, and with due regard to the rights of others having the same beneficial use in the water of the stream."

Upon final hearing of the case of *Morris vs. Bean,* 146 Fed., 423, referred to in the above case as reported in 123 Fed., 618, the Court took up the question of jurisdiction, and held that it had jurisdiction to determine the rights of different persons using water from an interstate stream. And the identical question was raised that is raised by the appellants in the case at bar, to-wit: that the question raised the rights of the sovereign state, in its exercise of sovereignty over the waters of the streams. Of this the Court said, page 429:

> "The jurisdiction is challenged because Sage Creek is an interstate stream, which, it is argued, precludes an appropriator in Wyoming from assertion of his rights in Montana; that the State of Montana, having recognized the right to appropriate the waters within its borders, it becomes a matter of state concern, which would put upon Wyoming the necessity, in the exercise of its sovereignty, of instituting a suit in the Supreme Court of the United States against the State of Montana and that a private citizen of one state cannot enter the courts of another to assert that which is exclusively an exercise of the sovereign power of the state; that the defendants are protected by the laws of Montana, which authorizes appropriations to be made within

its territorial limits, and that it is not competent for the Court to interfere with the sovereignty of one state by permitting a citizen of another state to collaterally assail that which it has recognized by its laws and will uphold as a part of its political jurisdiction."

That, in sum and substance, is the contention of the Appellants in the case at bar.

Of this contention the Court said, page 430:

"The contention ignores the right to appropriate water, which is recognized by both states. It assumes a condition which does not in fact exist, viz: that the State of Montana has undertaken to authorize the appropriation of water, as against a prior appropriator in another state. It has authorized by its laws the taking of unappropriated waters. Indeed, it could not authorize the taking of any other without doing violence to well-known principles; and the rule would be the same, whether the statutes of that State expressly limited the right to take unappropriated waters, or were silent upon the subject; because the doctrine of appropriation as construed in Montana and elsewhere is well understood to apply to water, the right to the use of which has not already vested in others. In both states the custom of appropriation had been fully recognized before the complainant and intervenor began the use of the water, claimed by them, and it had the sanction of the statutes of both while they were territories, and subsequently received express recognition in the constitution of Montana and in the constitution of Wyoming, as shown elsewhere in the opinion. It also had the sanction of the general government, *the owner of both the land and the water*, and the artificial line drawn between the two territories, created by Congress, could in no way debar one from the exercise of a right so universally acknowledged. A natural stream flowing in Wyoming was as much upon the public lands as the same stream flowing in Montana. At the time of the adoption of the constitutions of those states the rights of the complainant and the intervenor had vested. For the courts, in the absence of any express and unqualified assertion, either in the constitution or statutes of Montana, or any claim on the part of the state through its proper officers,

through whom the contention could only be made if it could be made at all, to deny the existence of an appropriation made in Wyoming, would be to violate that which has been accepted without dissent, and to disturb vested rights which have the approvel of general acquiescence, at the behest of a private suitor, who seeks to invoke the power of the state to do that which it does not even contend for. It would overlook that well-known comity existing between these states, both of which recognize the same doctrine as applied to the use of water, insofar as it relates to an appropriation of the same, as well as to ignore a public policy well recognized and existing, which has its approval in custom of equal efficacy to the right to appropriate at all—a right which inheres in and is a part of, the custom to which appropriations of water must be referred."

The Court then again refers to the Federal decisions upon this subject, and held that it had jurisdiction, and held (page 435) that as to the equities between the parties, simple priority in point of time gave priority of right, regardless of state laws.

In the case of *Miller & Lux vs. Rickey*, 146 Fed., 574, the same question of jurisdiction was raised, over an interstate stream, and it was there held that the Court had jurisdiction to determine the entire subject. That case was before the Court of Appeals, 9th Cir., 152 Fed., 11. Of the questions concerning an interstate stream, the Court said, page 17:

"That our position may be fully understood, we will extend the discussion a little. The water in a stream, which has a propensity to seek its level, and will continue in its current to the sea, is in strict reality the veritable thing in controversy. It knows not imaginary state or county lines and is a thing in which no man has a property until captured, to be applied to a beneficial use. The right of appropriation is recognized in law, which means the right of diversion and use. It is a right, not to any specific water, but to some definite quantity of that which may at the time be running in the stream * * * to the point of diversion. *The fact of a state line intersecting the stream does not within itself impinge upon the right. In other words, the appropriation may still be acquired although the stream is interstate and not local to one state, nor will the mere fact that the stream has its source in one state au-*

thorize the diversion of all the water therein as against the earlier and prior appropriator across the line in another state. On the contrary, one who has acquired the right to the water of a stream by prior appropriation in accordance with the laws of the state where made, is protected in such right as against subsequent appropriators, though the latter withdrew the water within the limits of a different state. (Citing authorities.) So that in determining the right of appropriation in one state, it may become necessary to ascertain what are the rights in another, and the mere assertion of rights in the courts of the latter state cannot operate to preclude the courts of the former from exercising cognizance over the entire subject matter before them. The very question that appellant makes was determined in the case of *Anderson vs. Bassman, supra.* 'It is objected by the defendant,' says Morrow, Circuit Judge, 'that the relief sought by the bill in determining the rights of the complainants to a specific quantity of the waters of the west fork of the Carson River, is beyond the jurisdiction of this Court, in that it is asking the Court to pass upon title to real property in another state.' And the decision was against the contention. So the decision here must be against the appellant's contention upon the point urged."

Like questions were raised in the case of *Bean vs. Morris.* When that case reached the Court of Appeals, 9th Cir., 159 Fed., 651, the Court said, page 654:

"Sage Creek is a non-navigable stream, the waters of which rise in the State of Montana and then flow into the State of Wyoming. The main contention of appellants, and one that has been most strongly urged in the argument and brief of their attorneys, is that the appellees could not by prior appropriation or diversion of the waters of Sage Creek at a point within the State of Wyoming, acquire the right to continue the diversion of such waters as against a junior appropriator of the waters of the same stream in the State of Montana. The argument in support of this contention is based upon the proposition that the water flowing in Sage Creek within the State of Montana belongs to its citizens, and their rights to divert the same at points within and upon lands of that state cannot be taken from them by a prior appropriation or diversion of the waters of the same stream in the State of Wyoming.

> "*The proposition thus stated is not a new one, and has been decided adversely to the contention of appellants in Howell vs. Johnson*, 89 Fed., 556; *Morris vs. Bean*, 123 Fed., 618. This Court also, in *Rickey Land & Cattle Co. vs. Miller & Lux*, 152 Fed., 11, in discussing the question of the jurisdiction of the Circuit Court of Nevada to quiet title to a water right, where the complainant claimed title by prior appropriation of a certain part of the flow of a river to irrigated lands in Nevada, and alleged that such rights were being interfered with by defendant, a junior appropriator of the waters of the same stream in California, said: (Then follows the quotation above cited.) It is not deemed necessary to add anything to this statement of the law. The right to divert to appropriate for a useful purpose the water of a non-navigable stream, is recognized by the laws of Montana and Wyoming and by Secs. 2339 and 2340 of the Revised Statutes; *and if the broad principle which underlies the relative rights of appropriators from the same stream is, that whoever is first in time is first in right, and the fact that the stream, the waters of which are appropriated, is interstate and non-navigable, does not affect the rule.*"

That case came to this Court and is reported in 221 U. S., 485. Of interstate streams and water rights the Court said, page 487:

> "But with regard to such rights as came into question in the older states, we believe that it always was assumed, in the absence of legislation to the contrary, *that the states were willing to ignore boundaries and allow the same rights to be acquired from outside the state that could be acquired from within.* (Citing authorities.) There is even stronger reason for the same assumption here. Montana cannot be presumed to be intent on suicide, and there are as many, if not more, cases in which it would lose, as there are in which it would gain, if it invoked a trial of strength with its neighbors. * * * The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States. It was recognized by the statutes of the United States while Montana and Wyoming were such territories (Rev. Stats., Secs. 2339, 2340), and is recognized by both of the states now. *Before the state lines were drawn, of course the prin-*

> *ciple prevailed between the lands that were destined to be thus artificially divided.* Indeed, Morris had made his appropriation before either state was admitted to the Union. * * * It follows from what we have said that it is unnecessary to consider what limits there may be to the powers of an upper state if it should seek to do all that it could. The grounds upon which such limits would stand are referred to in *Rickey Land & Cattle Co. vs. Miller & Lux*, 218 U. S., 258, 261." The decree was affirmed.

The jurisdiction of the Federal Court was also affirmed in *Rickey Land & Cattle Co. vs. Miller & Lux*, 218 U. S., 258. So that so far as the jurisdiction of the subject matter is concerned, that is finally and absolutely set at rest by the two cases last above cited.

Practically the same question was resolved against the appellants by the Court of Appeals of the Eighth Circuit, in *Perkins County vs. Graff*, 114 Fed., 441. In that case Perkins County had issued bonds to assist in the construction of a canal, which took its waters from the *Platte River at a point within the State of Colorado, for the purpose of irrigating lands in Colorado and Nebraska.* It was contended that the purpose and object of the corporation, to aid which Perkins County had issued the bonds, *was a violation of the laws of the State of Colorado*, in that Colorado owned the water within the state and a diversion of that water from the state, for the purposes of irrigation in Nebraska, was a violation of the laws and Constitution of Colorado. At page 446 Judge Sanborn resolved the contention against Perkins County, saying:

> "There is no law of that state to which our attention has been called, which prohibits such corporation from obtaining by purchase the right of way through private property, and no reason is perceived why the scheme of the Irrigation Company was not both rational and lawful."

This decision settles the contentions of the appellants, not only as to the jurisdiction of the Court, but also as to the right of the appellee to divert and carry water to the State of Nebraska.

The identical question was before the Supreme Court of the State of Wyoming, in the case of *Willey vs. Decker*, 11 Wyo., 496 (73 Pac., 210). The opinion was written by Judge Potter, and he reviews every phase of the controversy, and as to the source of title, states, page 522:

> "The appropriator acquires title by appropriation and application to some beneficial use, and of which he cannot be deprived except in some of the modes prescribed by law."

The performance of those acts is all that is required under the Federal law, as well as the law of every arid state.

Of the question of interstate rights, he says, page 531:

> "This being the law, under whatever system the right to appropriate water for irrigation is recognized, the natural and logical result of the doctrine would seem to be, at least in the case of interstate streams, and in the absence of contrary constitutional or statutory provisions, that the separation of the lands capable of irrigation from such streams, by state lines, is of no consequence if we are to consider merely the general principles of the doctrine and the reasons that called it into existence. The same necessity applies to the lands on either side of the line, and the water naturally flows in the channel of the stream in disregard of such line, above as well as below it. We are not aware of any rule which restricts as to location the point of diversion in initiating an appropriation, except the probable requirement that it be so located as to render the proposed diversion feasible, in view of the intended use, and possibly that if the proposed point of diversion be situated upon lands of another the appropriator shall secure a right of way for his ditch."

And again, page 534:

> "Upon the general principles governing such appropriation we perceive no reason, if the same be not prohibited by statute, *why the owner of lands in another state may not at a point in this state lawfully divert the water of a stream flowing in both states, and conduct such water upon his lands, for their irrigation, and thereby secure a valid water right.*"

As to jurisdiction, the Court said, page 542:

> "We are of the opinion, also, that jurisdiction resides in the Court to restrain the defendants, as well as the defendant, Obberreich, from diverting the waters of the stream, as alleged, to such an extent as to deprive the plaintiffs, Willey and Ellison, of the water appropriated by their grantor by means of the ditch in question."

Wyoming, like Colorado, is now asserting state ownership.

The Supreme Court of Utah, in *Conant vs. Deep Creek & Curlew Valley Irr. Co.*, 23 Utah, 627, 631 (66 Pac., 188, 190), concerning an interstate stream, said:

> "It is a recognized rule of law that a person who has appropriated water at a certain point in a stream is entitled to have so much of the waters of said stream as he has appropriated flow down to him to the point of his diversion, and if the settlers higher up on the stream *in another state, whose appropriations are subsequent, divert any of the waters of the stream, which have been so first appropriated, then the Courts of the latter state will protect the first settler in his rights.*"
>
> Citing Howell vs. Johnson, 89 Fed., 556.

In *Taylor vs. Hulett*, 15 Idaho, 265, (97 Pac., 37, 39) an action was brought to restrain the diversion of water from an interstate stream by residents of Wyoming to the injury of a citizen of Idaho, concerning the right to divert water from an interstate stream. The Court said at page 271:

> "It would seem, upon both reason and authority, that the courts of this state, in ascertaining, decreeing, and protecting property rights in water appropriations within the jurisdiction of the state, may at the same time and for that purpose inquire into and determine rights and priorities on the same stream that are located and situated beyond the state line, in order to fairly and finally judicially determine the relative rights of the parties and decree the extent of the title and right of possession of the thing or subject-matter within this jurisdiction. This proposition ought to be accorded a special recognition and application by the courts in water and irrigation litigation. Streams rise in one state and flow into another, irrespective of boundary lines, and still the rules and doctrines of priority of appropriation and use are the same in most of the arid states. This is particularly true with respect to this case. Here the riparian doctrine of the common law has been abrogated in both Idaho and Wyoming, and the rule of "first in time is first in right" is recognized and enforced in both states. *Drake vs. Earhart*, 2 Idaho, 750, 23 Pac., 541; *Moyer vs. Preston*, 6 Wyo., 308, 44 Pac., 845; 71 Am. St. Rep., 914; *Farm Investment Co. vs. Carpen-*

ter, 9 Wyo., 110, 61 Pac., 258, 50 L. R. A., 747, 87 Am. St. Rep., 918; *Wiley vs. Decker, supra.*

"The relative rights, therefore, of appropriators of the water of an interstate stream are the same, whether the appropriations are all in the same state, or some in one state and the balance in another state. This proposition is accentuated in a case like this, where the Court not only has jurisdiction of the *res* or subject-matter, but also obtains jurisdiction of the person of the defendant. In the case at bar the diversion by the defendants, being the act that causes the injury, takes place in Wyoming; but the injury itself that flows from the wrongful act takes place in this state. It has long been recognized as a general rule that, where an act is committed in one jurisdiction that occasions injury or damage in another jurisdiction, the injured person may elect to bring his action in either jurisdiction. See discussion and authorities cited in *Rickey Land & Cattle case* above cited."

We have made an exhaustive search of the authorities and have brought together every case we have been able to find upon the question of the source of title of water together with all decisions of courts where the question of rights for irrigation upon interstate streams have been adjudicated and the uniform opinion is, that the title first rested in the United States; that the necessity of irrigation was recognized by Congress by the Act of 1866 which act not only recognized and ratified appropriations from streams made prior to that date, but was prospective in its operation and constituted a grant to all those who should acquire a right to water by the compliance with the local laws, rules and customs. That source of title was recognized by all of the earlier Colorado decisions.

Further, the decisions are uniform that artificial state lines have no effect upon this right of appropriation and in every case where there has been an appropriation of water from an interstate stream, the right has been confirmed by the courts.

The appellants do not cite a single decision to the contrary. The cases which they have cited to the effect that a state owns the water it will be found were either navigable waters or in states where riparian rights still exist. The case of *Hudson Water Company vs. McCarter*, 209 U. S., 349, can have no application here because of the doctrine of riparian

rights adheres in New Jersey and the Court itself said at page 356:

> "*The problems of irrigation have no place here.*"

The entire decision is founded upon the doctrine of riparian rights, that no private owner could contract for the complete diversion of water from the stream because it would be an invasion of the rights of the lower owners.

Great reliance is placed by counsel upon the case of *Lamson vs. Vailes*, 27 Colo., 201, but that was a special case brought under the irrigation laws of Colorado for the adjudication of priorities, in which the jurisdiction of the court is limited to the adjudication of water rights within its district, and not the adjudication of water rights beyond the state lines. Counsel also rely upon the statement of this Court in the case of *Georgia vs. Tennessee Copper Co.*, 206 U. S., 230, 237, to the effect that

> "The state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain,"

as quoted by counsel in their brief at page 112, but that sentence is limited by the Court in the preceding sentence of the opinion to this effect:

> "This is a suit by a State for an injury to it in its capacity of *quasi*-sovereign."

The suit was brought to enjoin the defendant from discharging noxious gases from their works in Tenneesee over the plaintiff's territory. That raised an entirely different question than that in the case at bar, and while it may be admitted that the State of Colorado has an interest in all the natural streams of the State as a *quasi*-sovereign, that is not title to the water nor does it give Colorado any right to claim such title for the very simple reason that Colorado by its Constitution and Statutes permits the appropriation of water for the irrigation of lands without any limitation as to time or place of use, while in the Georgia case this was a Tennessee corporation operating its works in the State of Tennessee, but discharging its gases over the territory of Georgia.

Another view of this case will show the fallacy of the argument of the appellants. By the Enabling Act of Congress, it was required of the people of Colorado that they should provide by an Ordinance irrevocable, to forever dis-

claim all right and title to the unappropriated public domain of the territory. This Court has held that so far as the natural streams upon the public domain are concerned are subject to the right of disposition by Congress. Those streams while in the public domain, are part of the public property. If Colorado could acquire title to the streams on the public domain when, where, and how does its title attach. The Court will doubtless take judicial notice that more than one-third of the total area of Colorado is still a part of the public domain reserved and withdrawn from entry and by proclamation of the President, or the Secretary of the Interior and set apart as forest reserves. These forest reserves occupy practically all of the high mountainous regions approximating one-third of the total area of the state, embracing the head-waters of every creek, river and stream in the state and each stream flows for long distances through such forest reserves. Colorado has no title to the waters while in such forest reserves. Does the Colorado title attach the moment the stream crosses the border of those forest reserves or is the title reserved until the stream reaches the plains where the water of every stream is entirely appropriated? The Republican River and its tributaries are to be excepted from the statement that all the streams rise in the mountains because this stream has its source far out on the plains and is fed by springs having their source in large out-crops of sandstone. Because the Republican River is an exception to the general rule and does not have its source in the mountains, will that fact make it an exception so that the claim of title to its waters is vested in Colorado?

As heretofore said before Colorado can claim title to the waters it must be able to point to some congressional act by which that title has been granted and until it can do so it is without title other than its right of sovereignty and the right to exercise police power and control over the distribution of its waters, power which we do not deny.

Other Contentions of Appellants.

It is contended that the decree of adjudication rendered in Phillips County whereby the appellee was granted fifteen (15) feet of water for use in Colorado is conclusive upon it in this case, and that this suit constitutes a collateral attack upon that judgment.

The rights here contended for by the appellee were expressly excluded from the decree in the adjudication case, and the Court there was careful to protect the appellee against this very contention by declaring that the decree should in no way affect any right or claim or interest to divert water

from any of the streams in Water District No. 65 of Colorado for the irrigation of lands either in Nebraska or Kansas. (Record, page 4.)

We are not attacking that decree either directly or indirectly. We are not questioning the decrees of the other ditches so adjudicated in that decree, and the case of *O'Neil vs. Northern Irrigation Company*, 242 U. S., 20, and other cases cited by counsel for appellant on pages 150, 151 and 152 have no bearing whatever on this case.

The case of *Hawkins vs. Bleakly*, 243 U. S., 210, is greatly relied on because it was there held that the Ordinance of 1787 providing for the government of the Northwestern Territory ceased upon the admission of the territory or parts thereof as a state. That Ordinance related to the *government* of the Territory, not to the disposition of government property therein, and most naturally would cease when the territory was admitted into the Union as a state, and its own laws became effective.

It is further contended that the State of Colorado was an indispensable party. If this is true, then no question concerning the rights to water could ever be adjudicated without the consent of the state.

As heretofore shown more than a third more water had been prior to the beginning of this suit, appropriated than actually flowed in this stream, therefore, there was no title in Colorado, because there was no unappropriated water, the water when appropriated became private property, and the ltigation was then between private persons when the right of this disposition was questioned.

It is further contended that somehow or other there are still riparian rights in land owners of Colorado who are entitled to an equitable apportionment of the waters in the stream, and that the Colorado ditch owners were riparian owners and using water without waste. The offer to show the date of patent of riparian lands on the Republican River to have been prior to 1889, could not in any event bear out the contention claimed for it. The lands after patent are solely within the jurisdiction of the State of Colorado, and governed by the Colorado law with respect to riparian rights.

The Supreme Court in *Norton vs. Whiteside*, 239 U. S., 144, 153, held that the claim of riparian rights was a question to be determined solely by the local law.

In *Devine vs. Los Angeles*, 202 U. S., 313, 337, it is said, quoting from *San Francisco vs. Scott*, 111 U. S., 768, as follows:

> "Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever ap-

> pertained thereto, was one of state law and of general public law, on which the decision of the State Court was final."

Coming to the decisions of Colorado upon this subject, the Supreme Court of Colorado in 1882, in the case of *Coffin vs. Left Hand Ditch Co.*, 6 Colo., 443, 446, said:

> "We conclude then, that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado."

This doctrine has been at all times strictly adhered to in Colorado.

They likewise attack the so-called Nebraska decree, contending that it was not binding upon the State of Colorado because not a party thereto, and no service of notice was had upon it. It was not the purpose of adjudicating the right to use water in Nebraska to assert its binding force in Colorado, but simply to show that the appellee was entitled to the use of water in the irrigation of lands in Nebraska by reason of a full compliance with the laws of Nebraska. The effect of the Nebraska decree is exactly the same as the effect of a like decree in Colorado. It is not the granting of new rights, but the putting in permanent form evidence of a pre-existing right. It is the pre-existing right which we are here seeking to enforce, not a right based upon the decree of Nebraska, but evidenced by it.

Neither is the appellee necessarily seeking water in Colorado based upon Nebraska law. Our right to the Nebraska water is based upon prescription, a right which was originally inaugurated by an appropriation in accordance with the laws of the United States, and we are now seeking to enforce a right guaranteed by the laws of the United States.

Having used this water for more than twenty years, diverted in Colorado, and transported and put to beneficial use in Nebraska, the appellee has not only acquired a right to transportation, but by virtue of having complied with the local laws, customs, rules and regulations of both Nebraska and Colorado, there is vested in the appellee an incontestible right to continue to divert, carry and transport such waters to the State of Nebraska, *and this right is not only guaranteed to the appellee by the Act of Congress of 1866, but by the interstate commerce clause of the Constitution.* The appellants can gain no comfort from the laws of Nebraska based upon its

modified riparian rights. *No riparian owner of Nebraska is here complaining.*

It needs no citation of cases to the fact that the appellant cannot insist that the rights of riparian owners in Nebraska are invaded by the acts of the appellee in diverting this water when those riparian owners by reason of their silence, consent thereto, and in any event are raising no question here.

The statutes of Nebraska with respect to the use of water for irrigation provide as follows: (Revised Statutes of Nebraska, 1913. Original statute enacted in 1889.)

> "Sec. 3369: Water for the purposes of irrigation in the State of Nebraska is hereby declared to be a natural want."
>
> "Sec. 3370: The water of every natural stream not heretofore appropriated within the State of Nebraska is hereby declared to be the property of the public and is dedicated to the use of the people of the state subject to appropriation as hereinbefore provided.
>
> "Sec. 3371: As between appropriators the one first in time is first in right."

Those sections read like the Colorado law and to all intents and purposes are copies thereof.

While the earlier decisions of Nebraska, like those cited by appellants, seem to hold to the common law rule of riparian rights, yet the Supreme Court of that state, in *Kirk vs. State Board of Irrigation*, 90 Neb., 627, 631, held that the running water of Nebraska is *publici juris*. Its use belongs to the public and is controlled by the state in its sovereign capacity, and that not even a riparian proprietor could appropriate it without permission of the state; that the state had such a beneficial interest in the use of the waters that it was capable of granting the use thereof, and the title, until appropriated and granted, rested in the state. That decision goes beyond anything that the Supreme Court of Colorado has yet held.

In *Enterprise Irrigation District vs. Canal Company*, 92 Nebr., 121, the Supreme Court of that State makes an exhaustive review of the irrigation laws of Nebraska. It sustained the authority of the State Board of Irrigation to adjudicate water rights, that its power was *quasi-judicial*, and its adjudications binding upon everyone. In *Cline vs. Stock*, 71 Neb., 70, 78, the Court held that the owner of a mill using water for power purposes by a seven years' user of water was entitled to maintain the same under a prescriptive right and could enjoin the use of the water farther up the stream for

irrigation by riparian owners. And this, notwithstanding the mill was located beyond the Nebraska state line.

Other Nebraska decisions could be cited supporting the Nebraska irrigation laws, but the foregoing is sufficient to show the rights of irrigation under the laws of Nebraska. The same rights are acquired as in Colorado and practically in the same manner.

CONCLUSION.

That the following propositions are established beyond question must be admitted:

That in the arid West irrigation is a necessity. That Congress recognized it in 1866. Whether this act constituted a grant or only a recognition of a pre-existing right of necessity, *it was a permission* granted by Congress of rights of way for ditches, and of appropriation and diversion of water from streams for beneficial purposes upon compliance with the local laws, rules and customs, and this without regard to place of diversion or of use. That Colorado, both as a Territory and as a State, recognized the right as one of necessity existing prior to its Constitution. That both Colorado and Nebraska by legislation and court decisions recognize the necessity of irrigation and have abandoned the common law doctrine of riparian rights. That an axiom of irrigation law everywhere is:

> "He who is prior in time is prior in right."

The whole situation then resolves itself into this:

The right of appropriation is universal in the arid regions, unlimited as to persons, unrestricted as to place of use, it exists regardless of county or state lines. The acres of Wyoming, Utah, New Mexico, and Western Kansas and Nebraska are as dry and are as fruitful as those of Colorado when watered. This right does not rest in or upon the Colorado Constitution, but was a concomitant of the land which Congress permitted to be segregated therefrom and put to beneficial use before the establishment of the state lines in controversy.

In short, the situation is exactly described in the language of Mr. Justice Holmes in *Bean vs. Morris*, 221 U. S., 485, 487, in this language:

> "The doctrine of appropriation has prevailed in these regions probably from the first moment that they knew of any law, and has continued since they became territory of the United States. It was recog-

> nized by the Statutes of the United States while Montana and Wyoming (Colorado and Nebraska) were such territory * * * and is recognized by both states now. Before the state lines were drawn, of course the principle prevailed between the lands that were destined to be thus artificially divided. * * * The only reasonable presumption is that the states upon their incorporation continued the custom that had prevailed theretofore, and made no changes other than those necessarily implied or expressed."

For the foregoing reasons I submit upon the motion to dismiss, this Court is without jurisdiction and the cause should either be dismissed or the judgment of the Court of Appeals affirmed, and that on the merits of the case the judgment should be affirmed.

Respectfully submitted,

EDWIN H. PARK,
Solicitor for Appellee.

INDEX

	Page
Preliminary Statement	1
Motion to Dismiss or Affirm	3
All Errors to District Court are Before This Court	3
No Prescriptive Rights Involved	5
Jurisdiction	14
Other Matters in Appellees' Brief	55
Conclusion	56

CITATIONS

CASES—	Page
Bean vs. Morris, 221 U. S. 485	29, 48
Bergman vs. Kearney, 241 Fed., 884, 892-3	52
Boquillas Land & Cattle Co. vs. Curtis 213 U. S. 399	47
Clark vs. Ashley, 34 Colo. 285, 288	12
Cardwell vs. American Bridge Co., 113 U. S. 205	40
Coyle vs. Oklahoma, 221 U. S. 559	24, 34, 41
Crawford Co. vs. Needle Rock Co., 50 Colo. 177	9
Escanaba Co. vs. Chicago, 107 U. S. 678	37, 38
Farmers U. D. Co. vs. Rio Grande C. Co., 37 Colo. 512, 515	9
Ft. Morgan L. & C. Co. vs. So. Platte D. Co., 18 Colo., 1, 3	9
Gutierres vs. Albuquerque Co., 188 U. S. 545	47
Hamilton vs. Vicksburg Ry. Co., 119 U. S. 280	40
Hartman vs. Tresise, 36 Colo., 146	2
Hauenstein vs. Lynham, 100 U. S. 483, 490	47
Hawkins vs. Bleakly, 243 U. S. 210	46, 45
Huse vs. Glover, 119 U. S. 543	41
Illinois Central R. R. Co. vs. Illinois, 146 U. S. 387, 434	39
Kansas vs. Colorado, 206 U. S. 46	25, 32, 42, 43, 52
Lamson vs. Vailes, 27 Colo. 201	23
McCarter vs. Hudson Co. Water Co., 70 N. J. E., 525, 695; 209 U. S. 349	13
Northern Pac. Ry. Co. vs. Duluth, 208 U. S. 581, 596	14
O'Neill vs. Northern Colo. Irr. Co., 56 Colo. 545; 242 U. S. 20	14
Pennoyer vs. McConnaughy, 140 U. S. 1, 23	49
Permoli vs. First Municipality, 3 How, 589	40
Pollard's Lessees vs. Hagen, 3 How. 212	35, 37
Rickey Land & Cattle Co. vs. Miller & Lux, 218 U. S., 258	29
Shiveley vs. Bowlby, 162 U. S., 1	39, 40
Snyder vs. Colo. Gold Dredging Co., 181 Fed. 62, 65	48, 52
Strader vs. Graham, 101 How. 82	40
Stockman vs. Leddy, 55 Colo. 24	23
Thurlow vs. Massachusetts, 5 How. 504, 583 (16 Curtis U. S. 525)	18
Twin Falls Canal Co. vs. Foote, 192 Fed. 583, 594	52

Page

United States vs. Cress, 243 U. S. 316 45
United States vs. Hanson, 167 Fed. 881, 92 C. C. A., 371 ..... 29, 52
United States vs. Rio Grande Irr. Co., 174 U. S. 690 41
United States vs. Winans, 198 U. S. 371 47
Utah L. & P. Co. vs. United States, 243 U. S. 389, 410 ..... 2, 23, 51
Walbridge vs. Robinson, 22 Idaho, 236, 241 14
Western Ind. Co. vs. Pillsbury, 170 Calif., 686, 694 18
Willey vs. Decker, 11 Wyo. 496, 511 22
Williamette Iron Bridge Co. vs. Hatch, 125 U. S. 1 41
Winter vs. United States, 207 U. S. 564 46

MISCELLANEOUS

Page

Congressional Record, vol. 35, part 7, pp. 6679-80 52
Constitution of Colorado, art. XVI, sec. 5 13
Constitution U. S., art. VI, sec. 2 47
In re Withdrawal of Public Lands for Irrigation Purposes, 32 L. D. 254 50
Kinney on Irrigation (2 ed.) pp. 1849-99 11
Land Decisions (26 L. D. 520, 524) 49
New Bear Valley Ir. Co. vs. Roberts, 30 L. D. 382, 386 50
Second Annual Report, U. S. Reclamation Service, 1902-3, p. 36 51
Silver Lake P. & I. Co. vs. Los Angeles, 37 L. D. 152-53 51
Statutes—Federal St. Annotated, 1905, p. 1098 52
Washburn on Real Property (6 ed.) vol. 2, sections 1252-60 12
Weil on Water Rights, (3 ed.) part 8 61

In the Supreme Court of the United States.

No. 147—October Term, 1918.

ADELBERT A. WEILAND, AS STATE ENGINEER OF THE STATE OF COLORADO, et al,
Appellants,

vs.

THE PIONEER IRRIGATION COMPANY,
Appellee.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF APPELLANTS IN REPLY TO BRIEF OF APPELLEE.

We regret that in the few hours permitted for preparation of a reply to the brief of appellee just served upon us, time will not permit an extended and exhaustive discussion of the many decisions cited by appellee and particularly of several cases from which quotations have been made without reference to the fact that the cases so cited in no manner involved the questions here at issue, and the further fact that the dictum quoted was either rejected by the court or implies a line of reasoning antagonistic or foreign to that adopted by the court.

We fear that too frequently the quotations from the cases, like those cited from the courts of Colo-

rado, leave an impression directly opposite or at least entirely different from the actual decisions of the courts. The Courts of Colorado have, with one accord, upheld the constitutional provision dedicating the waters of the state "to the use of the people of the state" whenever that question has come before them and while in some cases, as in *Hartman* vs. *Tresise*, 36 Colo. 146, it has been held that this constitutional dedication of the water of the streams to the public use of the people of the state did not confer upon the citizens a right to trespass upon the lands of owners along the streams, nevertheless, in none of the decisions of the courts of the state has the theory of Government control over and title to the air, game, waters, or other natural resources of the state, necessary to the general welfare and lives of the state and its citizens, been recognized. While it is not denied that the United States has retained the right to control and dispose of its lands, this does not recognize the right of the United States to control the most essential, life-giving element of this arid state whose control and careful administration by the state government is imperative for its very existence. As stated by Mr. Justice Van Devanter in *Utah L. & P. Co.* vs. *United States*, 243 U. S. 389, 410, where the converse of the present case was before the court and where a right of trespass upon lands of the United States was asserted to be in the control of the states by reason of the right of the states to control the use of waters within their borders:

> "Much is said in the briefs about several Congressional enactments providing or recognizing that rights to the use of water

> in streams running through the public lands and forest reservations may be acquired in accordance with local laws, but these enactments do not require particular mention for this is not a controversy over water rights, but over rights of way through the lands of the United States, **which is a different matter** and is so treated in the right of way acts before mentioned."

So in the present case, however interesting may be the brief quotations from cases dealing with "a different matter," the language used by the courts in such cases only tends to confusion.

Time, however, forbids a detailed discussion of the authorities.

Before proceeding to a consideration of the principal issues, we shall briefly refer to three topics discussed in appellee's brief.

Motion to Dismiss or Affirm.

Appellee in its present brief again prints the brief heretofore submitted by it to this Court upon its motion to dismiss this appeal or affirm the decision of the Circuit Court of Appeals. In opposition to that motion, appellants filed a brief and argument covering the entire matter, and we rest the question upon that brief without repetition of it.

All Errors to District Court are Before this Court.

Under the "Statement of Facts" (p. 4) and the title **"Errors Here Assigned Not Presented to the Court of Appeals"** (p. 10) in Appellee's brief, it is

asserted that "the record thus discloses that no question was presented by appellants by assignment or argument, other than the mere question of jurisdiction of the trial court." Counsel cites certain language from the opinion of the Circuit Court of Appeals to sustain his statements (p. 10), and thereby argues that this court is limited in its consideration of the case.

Both counsel and the Circuit Court of Appeals are and were in error. Assignments of error were set forth by appellants in their brief before the Circuit Court of Appeals. These assignments were to all purposes the same as those made in the appeal to this court, in so far as they refer to the decision of the District Court, but they were overlooked by the Circuit Court of Appeals. In the preparation of their original brief before the Circuit Court of Appeals, through inadvertance the assignments of error to the District Court, while set forth and referred to from time to time throughout the brief, were otherwise omitted from the printed document. But these assignments **were set forth in full** on the first pages of the reply brief of appellants and **were before** the Circuit Court of Appeals during its consideration of the case, notwithstanding any language of the decision to the contrary. (See Reply Brief of Appellants before Circuit Court of Appeals.)

The same errors to the decision of the District Court, assigned and set forth in full before the Circuit Court of Appeals, are again assigned to that decision in the appeal to this court, and in addition thereto, errors to the decision of the Circuit Court of Appeals. (See Record p. 59, also Appellants' Brief, pp. 73-91 incl.)

No Prescriptive Rights Involved.

It is asserted by appellee that:

> "Both the trial court and the Court of Appeals affirmed the claim of appellee to this water, on the ground of prescription, appellee having used the water for more than twenty years without objection or hindrance from Colorado or the water users in that State" (p. 18).

At the outset it may be observed that prescriptive rights cannot be obtained to property of a state. This would seem to require no further argument.

But such was not the finding of the lower courts. When reduced to final analysis, the finding of the District Court was to the effect that the users under complainant's canal had put to beneficial use such part of the waters of the stream as was left therein after diversion by the Colorado canals. There is no finding that the appellee and its predecessor had used the water of the Colorado stream for more than twenty years "without objection or hindrance from Colorado or the water users of that state," but on the contrary a finding by the District Court that the waters of the stream had been used "whenever they could receive it and it was not denied to them by those in Colorado who controlled the intake." The District Court found (R., 25):

> "I will also find that this complainant, or the land owners using water under the ditch of the complainant, situate in Nebraska, used and applied to beneficial pur-

> poses since the construction of the ditch, **the capacity of the ditch whenever they could receive it and it was not denied to them by those in Colorado who controlled the intake."**

The above finding is very far from one recognizing a continued and uninterrupted use. On the contrary, it would appear to be a specific finding that the alleged use had been an interrupted one and that it had been one with hindrance and opposition.

The only reference made to this topic by the Circuit Court of Appeals appears on page 54 of the record and, it will be observed, the Court merely referred to the allegations of the bill of complaint and not to the evidence or the findings of the District Court. The language used is:

> "The plaintiff alleges that it * * * has used said water in the irrigation of lands in Colorado and Nebraska for more than twenty years without complaint or hindrance from any one" (R., 54).

The mere recital of allegations of a bill of complaint should not be construed as the decision of the Court. Complainant alleged such an adverse use, but respondents not only denied it, but further pleaded that "the predecessor in interest of complainant ceased to operate and maintain complainant's ditch and abandoned the use of the same for many years and until shortly prior to the commencement of the action." (R., 10, fol. 17.)

The fact that the whole matter of alleged prescriptive right was deemed to be of no importance by

both parties to the record, is manifested by the fact that the evidence bearing upon the subject was omitted from the agreed record. What little of the evidence upon this topic we find in the agreed record, is adverse to appellee's contention:

> "Evidence was introduced by complainant * * * tending to prove the carrying capacity of its ditch, the amount of land thereunder in the State of Nebraska, the use of water for irrigation **when obtainable by consumers within the State of Nebraska** to the extent of its capacity, **and the failure to obtain its capacity by reason of the diversion by other ditches,** including the ditches of answering respondents." (R., 14, Complainant's Evidence.)
>
> "Respondent's testimony tends to show that less than the capacity of the ditch was beneficially applied for irrigation of lands within the State of Nebraska, and **that water had not been used** when available for the irrigation of lands **within the State of Nebraska** until shortly prior to the commencement of this action." (R., 15, fol. 27.)

This was followed by the finding of the District Court already quoted, *supra*, in which it was found that the Nebraska land owners had used water by means of the ditch "whenever they could receive it and it was not denied to them by those in Colorado who controlled the intake" (R., 25, fol. 42).

Similar assertion of findings by the District Court of continuous and uninterrupted use for twenty years

are erroneously made by counsel in various parts of the brief, and notably on pages 19, 30 and 42, and what we have said applies to all of them.

Whatever may have appeared in the evidence, although not included in the agreed record, the fact remains that it would have been a physical impossibility for the lands in Colorado now irrigated, to have been reclaimed and at the same time for the interstate canal (the lowest upon the stream) to have been diverting the water for use in Nebraska. The stream is spring fed and of unusually constant flow at its source in Colorado. When all the increment has been delivered to the stream it reaches its maximum normal flow near Wray, Colorado, where the quantity is 45 cubic feet per second when no canals are drawing water in Colorado. (R., 6.) This flow diminishes in quantity from this point as the stream flows easterly to the head of appellee's canal and, with no canals diverting water in Colorado, there is less than 45 cubic feet per second for diversion by the lower or appellee's canal, an amount less than its capacity. If, during all these years this water had been actually diverted and used by appellee, then, it must follow that no water was used in Colorado. The water could not have been used at both places at once. While now there is a great return of water to the stream after irrigation of lands in Colorado, such was not the case before irrigation of the lands under the Colorado canals and probably not for many years thereafter and every withdrawal of water from the stream by the Colorado canals, constructed since 1890, has undoubtedly diminished the flow down stream to appellee's canal and has interrupted and hindered the use of that canal to a more

or less corresponding degree. In other words, with each incoming Colorado canal there has been a decided reduction of the water in the stream and a corresponding use of the water in Colorado adverse and hostile to the asserted claim of the Nebraska users.

The courts of Colorado only grant final decrees to canals when it is shown, by the evidence in the adjudication proceedings, that the waters diverted have been actually applied to the reclamation of the lands to be served. (*Ft. Morgan L. & C. Co. vs. South Platte D. Co.*, 18 Colo., 1, 3; *Crawford Co. vs. Needle Rock Co.*, 50 Colo. 177.)

On the stream in question, the state court found, determined and decreed, in an adjudication proceeding to which appellee was a party and the correctness of which it admits by reason of having failed to object thereto or appeal therefrom (*Farmers' U. D. Co. vs. Rio Grande C. Co.*, 37 Colo. 512, 515), that 66½ cubic feet of water have been actually diverted and so used, continuously and beneficially, for the irrigation of lands in Colorado (R., 3). This decree, conclusive upon appellee, forbids it to deny that the very water it asserts it has used without hindrance or interruption during the years since 1890, has, on the contrary been diverted and used on Colorado lands to such a degree as to completely consume the whole flow of the stream in Colorado, were it not for the return seepage from the irrigated lands. And further, according to the very allegations of the bill of complaint (R., 3) and the decree of the state court, so conclusive upon and admitted by appellee, it is evident that the entire 45 second feet of the canal as it now runs at Wray (and which includes some return water which was not there of nature) was all taken into ditches and

used as early as March 19, 1894 (R., 3), and has since been so continuously used as to justify the entry of a final decree for its use by the state court.

That such are the facts is admitted by appellee in its brief. This it does in attempting to show that there was no unappropriated water in Colorado after its canal was built, but counsel fails to observe that by the very decree of the state court to which it was a party it conclusively appears that the water was in fact used in Colorado, openly, adversely and continuously as against any claims of appellee and its predecessor, for more than twenty years prior to the bringing of this suit and that by such taking and use of the water in Colorado, the canal of appellee, for more than twenty years, has been cut off from and deprived of the use of the waters of the stream, save only as to such portions as have not been diverted in Colorado but more particularly those waters of the streams which have returned from the irrigation of the Colorado lands. Counsel says:

> "But if Colorado did own the unappropriated waters, yet the record in this case shows that the normal flow of the stream at our headgate is 45 cubic feet per second (Record, page 21.) That there has been appropriated from the stream, exclusive of the Pioneer Ditch, 66½ cubic feet (Record, page 3), so that in any event there was no water left to which the Colorado title could attach," (p. 24, Brief of Appellee.)

The same or similar admissions of adverse user in Colorado appear throughout the brief and on page 95 the following appears:

> "As heretofore shown more than a third more water had been prior to the beginning of this suit, appropriated" (in Colorado by other ditches) "than actually flowed in this stream."

As the appropriations in Colorado, necessary to permit the state court to enter decrees therefor, were made by actual, continuous and beneficial user of the water by the owners of the Colorado canals, so admitted by appellee in its bill of complaint to be entitled to such decrees and of the respective dates set forth on page 3 of the record, then it must follow—that more than the entire normal flow of the stream in Colorado had been diverted and used by 1894 and continuously hitherto; that since the water was so actually used in Colorado, only such portions of it could be used in appellee's canal as might come back to the stream from return seepage or be added to the normal flow from springs by floods from occasional storms, in other words whatever water was left over after all Colorado use; and that such an indifferent, occasional and permissive user cannot be considered adverse, continuous, without hindrance or free from interruption.

Such a user of the residue of the waters of the stream, after all other Colorado appropriation had made use thereof, could not vest in appellee a prescriptive right to a preferred use of the waters of the stream. The elements necessary to give rise to a prescriptive right to the use of water are set forth in *Kinney on Irrigation* (2nd Ed.) Pp. 1849-99. He there discusses all the essential elements of prescriptive title by adverse user of water from a stream, and states in

effect that such a use of the residue of the stream as here obtained cannot give rise to any prescriptive right (Pp. 1875-99).

To the same effect are:

Washburn on Real Property (6th Ed.) Vol. 2, Secs. 1252-60;

Clark vs. *Ashley*, 34 Colo. 285, 288.

In the last cited case it is said:

> "But such a right cannot be acquired unless the person whose water is taken acquiesced in the taking and made no claim to it during the period."

In the case at bar, the use by upper canals of the entire normal flow of the stream throughout more than twenty years before this suit was brought (as conclusively found and determined by the decree of the state court) would certainly negative any presumption of acquisition of prescriptive right in appellee and, on the contrary, would reveal that if any such right existed in any person, it would be in the owners of the other Colorado canals which, though junior in time, have actually openly, notoriously, continuously and adversely taken the water from the stream at points above appellee's headgate and used it without interruption or hindrance by appellee or its predecessor. That the District Court recognized this infirmity in appellee's claim is evident from the language used in the findings wherein is found that appellee and its predecessor had used the canal to its capacity "whenever it could receive it and it was not denied them by those in Colorado who controlled the

intake". With such a finding a decree purporting to recognize and confirm a prescriptive right in appellee would have been in error, and hence evidently, the comparative silence of the agreed record upon this topic.

But whatever rights in the Colorado stream appellee and its predecessor had, they were acquired under the Constitution of the State of Colorado and the provisions of that instrument, declaring the water of all natural streams of the state, not appropriated prior to 1876, to be "the property of the public" or state and that "the same is dedicated to the use of the people of the *State*" (Sec. 5, Art. XVI), were read into and formed a part of and limitation upon the right, and whatever use may have been made of the valuable natural resource, so set apart and dedicated to the use of Colorado citizens and territory, no act of appellee or its predecessor could bind the state or estop its officers from asserting the limitations upon appellee's right whenever the state, through its officers, might elect. No right to use the public property of Colorado upon and for the benefit of the territory of the neighboring state, could become "vested" as sought to be adjudged by the District Court, without the consent of the State of Colorado obtained in a proper manner and not through the *ultra vires* or unlawful acts of a citizen. The rights of the state may not thus be bargained away, even though were the conditions different and the property wholly within Colorado, a vested right might otherwise be acquired as against other users.

McCarter vs. *Hudson Co. Water Co.*, 70 N. J. Eq. 525, 695, 209; U. S. 349;

Northern Pacific Ry. Co. vs. *Duluth*, 208 U. S. 581, 596;

O'Neil vs. *Northern Colo. Irr. Co.*, 56 Colo. 545, 242 U. S. 20;

Walbridge vs. *Robinson* 22 Idaho 236, 241.

And finally, we again respectfully urge that no prescriptive right could run against the State of Colorado by which its officers ~~are~~ may be coerced into a disobedience of its laws and the use of its greatest and most necessary public property and natural resource would be perpetually taken from it and the use thereof denied to the State and its citizens.

Jurisdiction.

The principal question is that of jurisdiction of the District Court. The sovereign jurisdiction of the State of Colorado to control the water of its streams to the same degree as that possessed by the original states; the right of its executive officers to regulate the use and distribution of the water of its streams according to the Constitution and laws of the state, free from interference by the imposition of foreign servitudes and claims of the citizens of other states; the right of the state, through its officers, to insist that its laws and the decisions of its courts shall be obeyed until declared to be in contravention of the Constitution of the United States and the want of jurisdiction in the District Court to override the state laws by its decree and to compel the officers of the state to enforce such decree in the face of contrary commands of the state, all are naturally involved in the question of jurisdiction of the District Court.

The State of Colorado, through its executive officers and its citizens, the appellants herein, asserts that it has sovereign jurisdiction over the waters of the North Fork of the Republican River while the same flows within the state to the same degree it would possess if it were one of the original states and that its exercise of sovereign power over the stream is exclusive while the stream flows within its territory subject only to have the equitable exercise of its sovereignty as against a similar exercise of the sovereign power of an adjoining state called into question in a suit between the states in this Court or subject to such limitations upon the exercise of its sovereignty as may be fixed by interstate agreement with the neighboring state, by consent of Congress, as in the Constitution provided. It asserts that it came into the Union upon a basis of equality "with the original states in all respects whatsoever" and that whatever laws may have governed the area within its boundaries while a territory, "all were superseded by the State Constitution" and that the territory and natural resources, theretofore held in trust for the new state, were as completely vested in the new sovereignty as they would have been had the state been carved out of the Northwest Territory.

The necessity for control of the air over its territory is the same as that of any other state and even more imperative is the necessity for the control and beneficial use of the water of its streams, according to local conditions and necessities, while these streams flow through its territory. Whether the water of the streams be taken from the state under claim of foreign servitude or preferred appropriation in behalf of users in other states, the effect is the same, the

natural resource is taken away and the state is deprived of its use and benefit as completely as though it were seized upon by force and its benefits perpetually annexed to the neighboring sovereignty. This the District Court assumed to do and, to compel the state, although not a party to the record, to obey its decree, it perpetually enjoined upon the executive officers of the state and their successors the observance of its decree thereby to disobey the law under which they act and by which their duties are prescribed. The District Court by its decree, assumed control of the political direction of the state officers by compelling them to disobey the Constitution and laws of the state, notwithstanding the constitutionality of those laws (as tested by the Constitution of the United States) was unquestioned. It in effect expropriated a natural resource of Colorado, necessary to the existence of the state and its people and conferred its benefits upon the territory and citizens of another state. The state was a necessary and indispensible party and the District Court was without jurisdiction.

The appellee, in answer to our brief herein, makes certain main contentions. As we understand them, these may briefly be summed up as follows: That the source of title to all lands carved out of the public domain is the United States; that water is in the nature of real estate and therefore the title to water is likewise dereigned by the individual directly from the United States; that inasmuch as the lands to be irrigated by the waters from the interstate stream in question were originally a portion of the Louisiana Purchase, the Code Napoleon, which recognized a law similar to the common law of riparian rights, origin-

ally prevailed; that upon the acquisition of this territory by the United States, the common law of riparian rights pertained, except as modified solely by the Act of Congress; that this was so modified by the Act of July 26, 1866, R. S. of the U. S., Sec. 2339, which permits the appropriation of water according to the local customs, laws and the decisions of courts, etc.; that the admission of the state of Colorado into the Union did not pass title to or sovereign jurisdiction over the waters to the state of Colorado, and, furthermore, that the statement in its constitution wherein it is said: "The water of every natural stream not heretofore appropriated within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided," did not and does not have any effect in transferring the sovereign jurisdiction to the state of Colorado; that title cannot be vested by mere fiat of law and that the only power of regulation which the state has is a state police power over the use and distribution of water, the title to which is still derived directly from the United States by actual appropriation by private citizens as recognized under the Act of 1866; that Congress has the sole and exclusive power to prescribe the time, the conditions and mode of the disposition of the property of the United States, and that the United States not only owned the land, but the beneficial use of the water. It was also suggested that the United States has exclusive jurisdiction upon the theory that water in interstate streams is the subject of interstate commerce. Therefore, it is said, the state of Colorado is not the owner of any water or water rights; that its

right is limited exclusively to the exercise of police power such as it exercises over all other property within its borders; that this case does not involve the sovereign rights of Colorado and that the suit against its executive officers is not a suit against the state.

These contentions of the appellee appear to be somewhat contradictory in this: It is argued that the only right of control which the state of Colorado has over its waters "is a state police control over the use and distribution of water the title of which was originally derived from the United States, by actual appropriation in private citizens as recognized by the Act of Congress of 1866, and the local laws of Colorado (p. 13) and that the state has no sovereign control or ownership whatsoever, yet the police power of a state is in all essentials the expression of its sovereign power. This is so fundamental as to need no argument. As stated by Chief Justice Taney in *Thurlow* vs. *Massachusetts*, 5 How. 504, 583 (16 Curtis, U. S., 525.)

> "But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions. * * * in every case it exercises the same power, that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominion."

And as recently quoted with approval by the Supreme Court of California in *Western Ind. Co.* vs. *Pillsbury*, 170 Cal. 686, 694:

> "'In fine, when reduced to its ultimate and final analysis, the police power is the power to govern' ".

It would therefore seem that to admit that the state had police power to control the use and distribution of the water of its streams, is to admit that it has sovereign control over such water and that whether its power be termed police power or sovereign power, the effect would be the same. Under either term it would have control of the use of the water while it flows within its territory and may fix the limitations upon such use according to its present or future necessities or those of its citizens, free from interference from without, save only for the right of Congress to regulate and control navigation and to bind the states by treaties with foreign nations, and the right of a neighboring state to bring the reasonableness exercise of the sovereignty into question in a suit before this court.

The contentions of counsel are further contradictory in that it is claimed that while the rights to the use of the water of the streams is withheld from the control of the state until it has passed directly from the United States to the individual or corporation making an appropriation thereof and that too irrespective of state lines, yet, it is said, that the right vests according to the "local laws of Colorado". The local laws of Colorado declare the waters of the state to be "the property of the public" and the same are dedicated "to the use of the people of the State" of Colorado. The statutes and decisions of the courts of the state declare that the use of the water of Colo-

rado shall at all times be free from foreign servitudes and the claims of citizens of other state; that our constitution and laws confer rights only upon users within the state and that diversions from the state are prohibited. It would, therefore, make no material difference whether the title of the appropriator to the use of the water of the stream came from the United States impressed with the laws of Colorado or directly from the State of Colorado.. The effect would be the same unless it be said that upon abandonment the right reverts to the United States and not the state. The constitution and laws of Colorado and the decisions of its courts would be read into the right obtained as completely in the one case as in the other. And while, if it be true, which we urge is not the case, that the United States still holds all title to and controls all the unappropriated waters of the western streams and the western states are thereby burdened with limitations in the exercise of sovereign powers which were not imposed upon the states east of the Mississippi river and eternal servitudes are placed upon the western streams by reason of the fact that when the use might be abandoned by the appropriator, the water therefore claimed would again become unappropriated and would pass out of the control of the state and back into that of the Government, irrespective of the fact that the Government had long since parted with all its public lands as upon the stream here involved, nevertheless, in so far as this case is concerned, the fact remains that under either theory the rights acquired in 1890, by the predecessor of appellee, in the use of water from the stream here involved, were only those rights which it could acquire under the con-

stitution and laws of the State of Colorado and were limited to use wihin the confines of the state and further that any diversion within the state for use upon lands without the state was subject at all times to the preferred claim of users within the state and no prescriptive right could be acquired against the state.

The argument of counsel has its principal theme in the theory that the United States still owns all the unappropriated waters of the streams of the western states of the Union; that such waters were inferentially reserved for disposition by Congress as a part of the public lands, although they point to no surrender from the states to the United States and admittedly find no mention of reservation of the water of the streams for disposition by Congress; that the title to all these waters still being in the United States, the title passes to the individual as though no states were in existence, save for the local laws which they do concede have some undefined effect upon the quality and limitations of the right; that inasmuch as the United States owns the waters of the western streams, even as in cases like the stream here involved where the government title had been extinguished from the source to the interstate line prior to any appropriation of water, the state has no interest or title in these waters, and the whole controversy may be settled between private appropriators regardless of state lines, even though the effect is to take the water forever from the territory of the state where the diversion is made and to forever deny that state the benefits of the use of the stream, and even though in so doing, it becomes necessary for a District Court to supercede the laws of the state and compel the executive officers of the

state to disobey its constitution and laws; that the rights acquired by the individual are so protected by some unmentioned law of the United States that the state may not prohibit the diversion for use in other states and that, upon the whole, the rights of the individual appropriator are superior to and above the constitution and laws of the state.

The many cases, from which counsel seeks to draw this deduction, are few of them in point, and the remainder have either been overruled or superceded by more recent decisions of this court upon review or by rejection of the principles upon which the former cases by state and lower Federal courts were founded. Many of these cases were specifically limited to the particularly state of facts then before the court, as in the case of *Willey* vs. *Decker*, 11 Wyo., 496, 511, where it was pointed out that the rights of the individuals, there in question, had vested before either state was admitted in the Union and the court was careful to say:

> "We are not called upon in the case at bar to decide whether such an appropriation as the plaintiff's * * * rely on can be lawfully made in this state under our constitution and present statutes; and we shall express no opinion on that matter,"

and opinion was limited to the particular facts before the court and the principles were applied

> "In the absence of contrary constitutional or statutory provisions" (p. 531).

The other cases cited all come, to a greater or less degree, within the same general objection and most of them were decided prior to the later decisions of this court to which we shall refer. The citations from Colorado cases having to do with the intrastate use of the waters of the streams and referring to the fact that the place of use is immaterial, are not in point and the question of diversions for use in Colorado for use in other states was not before the court. In every instance where such an interstate claim has been presented, the state courts have decided adversely to the right to divert for use outside the state (*Lamson* vs. *Vailes*, 27 Colo., 201; *Stockman* vs. *Leddy*, 55 Colo., 24), and the state has consistently defended against all extra territorial claims in this and other courts since the adoption of the state constitution and particularly during the past twenty years when foreign claims have been asserted.

The same may be said of those cases which refer to the right of Congress to dispose of public lands and the reasoning of which it is sought to apply to the control of streams. They are not in point and involve "a different matter" (*Utah L. & P. Co.* vs. *United States*, 243 U. S., 389, 410).

It would appear that there is no merit in the contention that Colorado has no sovereign control of her streams because, it is said, she can show no direct grant from the United States. Likewise, that the constitutional provision is inoperative because approved by presidential proclamation (pp. 38-39). The enabling act which gave the state its being ought to be sufficient if any grant is required (*Stockman* vs. *Leddy*, 55 Colo., 24.) This enabling act provided

that the state should be admitted upon an equality with the original states "in all respects whatsoever" and that the President should issue his proclamation, upon compliance with the enabling act, "declaring the state admitted into the Union on an equal footing with the original states" without further act of Congress. The state was either admitted into the Union upon an equality with every other state or not admitted at all. Any provision attempting to provide for admission upon any other ground than that of equality would be void and of no effect (*Coyle* vs *Oklahoma*, 221 U. S. 559). If the constitution of Colorado is void as in contravention of the Constitution of the United States it may be attacked in a proper proceeding, but no such contention is here made. If admission thru declaration by presidential proclamation operated at all it operated as completely as would an act of Congress and if such admission is inoperative, then Nebraska, Oklahoma, North Dakota, South Dakota and many other states likewise declared admitted by presidential proclamation are not states at all and if the constitution of Colorado is inoperative then the constitutions of all other states so admitted, are void and have been usurping the powers of states all these years.

It must be admitted that the United States never owned any portion of the public lands of Texas. Undoubted Texas came into the Union upon an equality with the original states. No grant was necessary to confer sovereign control or ownership of the water of its streams to the State of Texas. Neither Texas nor any of the original thirteen states ever made surrender of any control of the water of the non-navigable streams to the United States and the other states

retained like powers upon their admission, otherwise they would not have been admitted upon an equality with the original states. It would follow that the question is not what did the United States grant but what did the states, including Colorado, surrender. If no such surrender can be shown, no title in the United States exists.

The contentions of counsel have been disposed of by this court in several cases, most of them subsequent to the cases cited by counsel. We first refer to the cases of *Kansas* vs. *Colorado*, 206 U. S. 46, because that presented a controversy in which it was necessary to say whether the States possessed any sovereign interest in their waters. If counsel is correct, the waters of the Arkansas River belong to the United States and are wholly removed from State control or the effect of litigation between the States. It must not be overlooked that the government was represented by counsel in that case and that the special ground of the Government's interest in that controversy was the protection of its reclamation projects and that the United States had inherent power of sovereignty over interstate streams (206 U. S. 66.) The Government's contention did not fail because it was not presented or because it was overlooked. The logical conclusion from the argument of counsel, which he draws for himself, is that if the waters belong to the United States they have no justiciable interest in them as such, but the Court in *Kansas* vs. *Colorado* found that there was such justiciable controversy, which would imply that they rejected the present contention and that the basis of their decision was the recognition of some rights in the States greater than counsel is now willing to concede. In the opinion in

that case the Court inquires whether the question is one simply between States or is a matter subject to National legislative regulation and is the flow of the stream subject to the superior authority and supervisory control of the United States. The Court puts it thus (p. 87):

> "In other words, is the determination of the right of the two States *inter sese* in regard to the flow of the waters of the Arkansas River subordinate to a superior right on the part of the National Government to control the whole system of the reclamation of arid lands?"

As to the claims made in behalf of the reclamation projects generally the Court answers that as no power has been granted to engage in such enterprise, none can be exercised. It, however, concedes the authority to reclaim proportioned to the lands still in Government ownership by virtue of the power conferred by the Constitution upon Congress, "to dispose of and make all needful rules and regulations respecting its property." But this is at once qualified by the following statement:

> "We do not mean that its legislation can override State Laws in respect to the general subject of reclamation. While arid lands are to be found mainly, if not only, in western and newer states, **yet the powers of the National Government within the limits of those states are the same** (no greater and no less) than those within the limits of the original thirteen, and it would be strange if

in the absence of a definite grant of power the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders" (p. 92).

It then notices the provisions of Section 8 of the Act of June 7, 1902, as indicating the purpose of Congress not to disregard the limitation upon its power and then, as though to foreclose further consideration of the subject, it is said:

> "But it is useless to pursue the inquiry further in this direction. It is enough for the purposes of this case that **each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters.**"

From which the Court concludes, that each State

> "May determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation shall control. Congress cannot enforce either rule upon any State. * * * In the argument on the demurrer, counsel for plaintiff endeavored to show that Congress had expressly imposed the common law on all this territory prior to its formation into States. * * * But when the States of Kansas and Colorado were admitted into the Union, they were admitted with the full powers of local

> sovereignty which belonged to the other states, * * * and Colorado by its legislation has recognized the right of appropriating the flowing waters to the purpose of irrigation. Now the question arises between two States, one recognizing generally the common law of riparian rights and the other prescribing the doctrine of the **public ownership** of flowing water. Neither State can legislate for or impose its own policy upon the other. * * * It does not follow, however, that **because Congress cannot determine the rule which shall control between the two States,** or because neither State can enforce its own policy upon the other, that the controversy ceases to be on of a justiciable nature, or that **there is no power** which can take cognizance of the controversy and determine the **relative rights of the two States.** * * * One cerdinal rule, underlying all the relations of the States to each other is that of equality of right. Each State stands on the same level with the rest." (Pages 94-7.)

After discussing some of the fundamental facts, the court says:

> "The controversy rises, therefore, above a mere question of local private right and involves a matter of state interest, and must be considered from that standpaint (p. 99).

The opinion throughout seems to us a definite recognition of a sovereign right of the State of Colorado in and over the waters flowing within its bound-

aries subject to no limitation save such as by the act of union and the terms of the Federal Constitution the Supreme Court of the United States in case of controversy may deem essential to the preservation of the equality of rights between the States.

In *U. S. vs. Hanson*, 167 Fed., 881, Judge Gilbert construes the opinion to be a denial of any power in Congress to interfere with State control, and holds that the control, subject to the power of Congress to regulate commerce, is vested wholly in the States.

We next refer to the cases of

Rickey Land & Cattle Co. vs. Miller & Lux, 218 U. S. 258, and

Bean vs. Morris, 221 U. S. 485.

In both these cases the views of the Court, as stated by Mr. Justice Holmes, seems to be irreconcilable with the contentions of the ~~Government~~ counsel. In the latter case, he says (P. 486):

> "We know of no reason to doubt, and we assume that subject to such rights as the lower state might be decided by this court to have, and to be vested private rights, if any protected by the Constitution, the State of Montana has full legislative power over Sage Creek while it flows within that state. Kansas vs. Colo., 206 U. S., 46, 93-95. Therefore, **subject to the same qualifications,** we assume that the concurrence of the laws of Montana with those of Wyoming is necessary to create easements or such private rights and obligations as are in dispute, across their common boundary line. Missouri vs. Illinois,

200 U. S. 496, 521; Rickey Land and Cattle Company vs. Miller and Lux, 218 U. S., 258, 260. But with regard to such rights as came into question in the older States, **we believe that it always was assumed, in the absence of legislation to the contrary,** that the States were willing to ignore boundaries, and allowed the same rights to be acquired from outside the state that could be acquired from within." (Manville Co. vs. Worcester, 138 Mass., 89, and other cases cited). * * *

"It follows from what we have said that it is unnecessary to consider what limits there may be to the powers of an upper State if it should seek to do all that it could. The grounds upon which such limits would stand are referred to in Rickey Land and Cattle Company vs. Miller and Lux, 218 U. S., 258, 261."

In view of the fact that Colorado has expressly declined to ignore state boundary lines and **has refused to allow the same rights to be acquired from outside which can be acquired from within,** thereby negativing the presumption which the court says is indulged "in the absence of legislation to the contrary," we believe that this case, following, as it does, the case of Kansas vs. Colorado, fortifies the position that each state is a sovereign with full control over its waters unless it sees fit to waive that right of control.

We think it must be conceded that the foregoing gives no support to the theory that the right of appropriation is derived from and depends upon the jurisdiction of the United States, and therefore a

right common to the citizens of both States. In the case at bar the State of Colorado has sought "to do all that it could and by the Constitution, laws and the decisions of its courts has consistently maintained its right to the control of the use of the water of its streams for the benefit of the lands and people **within the state** ever since its admission as a state, while the water of its streams must, by process of nature, inevitably flow across its borders after use in Colorado, the State insists upon the preferred right to the use thereof, and manner as it may will, within its territory.

The argument of counsel in the main is based upon inferences which he believes may be drawn from decisions relating to the power of Congress to dispose of and make all needful rules and regulations respecting its property and specifically concerning treaties made in connection therewith. Such power being derived from the Constitution, it follows that each State is bound thereby, whether one of the original or one of the newer States, all States being in respect thereto upon an entire equality. It is a power of which the original States made surrender and each State comes into being upon the same terms. But was the delegation to the Federal Government of the power a surrender of anything more? Was it a surrender by the States of the ultimate jurisdiction of sovereignty over the lands which the Government possessed? We understand it is conceded that the moment the Government title passes the proprietary and sovereign right, which the Government theretofore possessed, ceases, and that the land becomes subject without qualification to precisely the status it would occupy if the Government

had never appeared in the chain of title, in other words, as though the lands were within one of the original States.

If the argument of counsel is to have any value whatever in this or similar cases, it must clearly demonstrate that, although the Government owns no land in a State created out of the public domain, it nevertheless possesses as a residuum from its original ownership of all the lands in the State, the jurisdiction to originate titles to the use of the water within the State, and, if in its wisdom thought wise, to formulate laws regulating the appropriation and use of water to the exclusion, if need be, of the laws of the State bearing upon the subject. A potent, but not necessarily conclusive, argument against any such view is the fact that Congress has never assumed or asserted any such power. As we have said, the power over the territory or other property of the United States is a granted power, and the question, therefore, is not so much what does the Federal Government possess, but what did the State governments intend to give? Did they surrender jurisdiction and control of those elements of material prosperity without which state development might be arrested and state ambitions defeated? Did the State of Texas intend to surrender to the United States any such power as that claimed? If it made no such surrender then Colorado, which was admitted upon an equality with Texas, made none. Of this paragraph in the Federal Constitution, Mr. Justice Brewer, in the *Kansas-Colorado* case, *supra*, said:

> "The full scope of this paragraph has never been definitely settled. Primarily,

> at least, it was a grant of power to the United States of control over its property. * * * But, clearly, it does not grant to Congress any legislative control over the States and must, so far as they are concerned, be limited to authority over property belonging to the United States within their limits. * * * The powers affecting the internal affairs of the States not granted to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, and all powers of a national character which are not delegated to the National Government by the Constitution are reserved to the people of the United States."

The function which the Federal Government performs in the acquisition of territory and the creation therefrom of States of the Union, is pretty well discussed and settled by numerous decisions of this Court. While it is true that by the Louisiana Purchase and the several grants from Mexico, the United States became possessed of all of the proprietary and sovereign title that the most favored nation, under like circumstances, could acquire, it was, nevertheless, never a part of our scheme of government that such conditions should be perpetual. This government of ours is primarily a union of States and the ultimate destination of all territorial acquisitions is the foundation of additional States, to the end that we shall continue as we commenced, as an indestructible union of indestructible States. The United States took and

thereafter held the territory in trust for the new states which should come in upon an equality and be possessed of all the sovereign powers of the original states. Therefore, the Federal sovereignty and proprietary title of the United States in its territory is but a passing phase, a mere preliminary to the time when such territory shall be carved into States. The States when so carved out of the territory of the United States, do not come into the possession of their powers by grant from the Federal Government, but because by the very fact of their existence they possess, in virtue of their definition and our political organization, all the powers, functions and sovereignties of their predecessors in the Union, and they merely come into possession of that which has always been theirs, although temporarily held in trust by the United States.

It was well said by Mr. Justice Lurton, in *Coyle* vs. *Oklahoma*, 221 U. S., at page 566, that

> "The definition of a State is found in the powers possessed by the original States which adopted the Constitution, a definition emphasized by the terms employed in all subsequent acts of Congress admitting new States into the Union."

It is this characteristic which, upon the creation of States upon the public domain, negatives the right of the United States to impose, by the enabling act or otherwise, any condition which in the slightest degree destroys this equality with every other State. Whatever may be the terms of the enabling act as to reservations or restrictions upon behalf of

the United States, they are effective only to the extent that could be enforced if not mentioned in the enabling act. In other words, the United States, or the Congress thereof, had no powers, by virtue of anything contained in the enabling act, in excess of that which may be exercised in the newly created State after its complete establishment and which likewise may be exercised if the same conditions were presented in any one or more of the original States.

All of this has been so often and so clearly stated that any elaborate quotation of opinions would be out of place; nevertheless, to preserve the continuity of our argument we shall recall the leading cases.

The first case in point of time was *Pollard's Lessees* vs. *Hagan*, 3 How. 212, in which, after noting the question presented, the Court said:

> "We now enter into its examination with a just sense of its great importance to all of the States of the Union and particularly to the new ones. Although this is the first time we have been called upon to draw the line that separates the sovereignty and jurisdiction of the Government of the Union and the State governments, over the subject in controversy, many of the principles which enter into and form the elements of the question have been settled by previous well considered decisions of this Court, to which we shall have occasion to refer in the course of this investigation. * * * We think a proper examination of this subject will show that the United States never held any municipal sovereignty jurisdiction

> or right of soil in and to the territory of which Alabama or any of the new States were formed, except for temporary purposes and to **execute the trusts** created by the acts of Virginia and Georgia legislatures and the deeds of cession executed by them to the United States and the trust created by the treaty with the French Republic of the 30th of April, 1803, ceding Louisiana" (p. 221). (The territory and stream here involved was a part of the Louisiana purchase and upon the admission of Colorado the "trust created by the treaty with the French Republic" was executed.)

Then, referring to the ordinance of 1787, which extended to the territory in question, the Court said:

> "Taking the legislative acts of the United States and the States of Virgina and Georgia and their deeds of cession to the United States, and giving to each separately and to all jointly a fair interpretation, we must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purpose of temporay government and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts created with them. * * * When the United States accepted the cession of territory they took upon themselves the trust to hold the

municipal eminent domain for the new States and to invest them with it to the same extent in all respects that it was held by the States ceding the territory. * * * Whenever the United States shall have fully executed these trusts, the municipal sovereignity of the new States will be complete throughout their respective borders and they and the original States will be upon an equal footing in all respects whatever. We therefor think the United States holds the public lands within the new States by force of the deeds of cession and the statutes connected with them and not by any municipal sovereignity which it may be supposed they possess or have reserved by compact with the new States for that particular purpose. The provision of the consitution above referred to shows that no such power can be exercised by the United states within a State; such a power is not only repugnant to the constitution, but it is inconsistent with the spirit and intention of the deed of cession." (pp. 223-4).

In *Escanaba Company* vs. *Chicago*, 107 U. S. 678, Mr. Justice Field said:

"But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people. This power embraces the construction of roads, canals and bridges and the establishment of ferries, and it can generally be ex-

> ercised more wisely by the State than by a distant authority. They are the first to see the importance of such means of internal communication and are more deeply concerned than others in their wise management." (p. 683).

What was then said by Mr. Justice Field bears with peculiar force upon the wisdom of committing to the arid States respectively all matters relating to the appropriation, use and distribution of water.

Further speaking upon the subject, Mr. Justice Field said:

> "And although the Act of April 18, 1818, Chapter 67, enabling the people of Illinois Territory to form a constitution and State government and the resolution of Congress of December 3, 1818, declaring the admission of the State into the Union, refer to the principles of the ordinance according to which the Constitution was to be formed; its provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a Government, whilst in a territorial condition, whether from the ordinance of 1787 or the legislation of Congress, it ceased to have any operative force except as voluntarily adopted by her after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of eminent domain and sovereignty which belonged to the original States. She was admitted and could be

admitted only on the same footing with them. The language of the resolution admitting her 'on an equal footing with the original States in all respects whatever.' Equality of constitutional right and power in a condition of all the States in the Union, old and new. Illinois, therefore, as was well observed by counsel, could afterwards exercise the same power over rivers within her limits that Delaware exercised over Blackbird Creek and Pennsylvania over the Schuylkill River" (pp. 688-9).

In *Illinois Cent. R. R.* vs. *Illinois*, 146 U. S. 387, 434, Mr. Justice Field again said:

> "The State of Illinois was admitted into the Union in 1818 on an equal footing with the original States in all respects. * * * There can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits."

In *Shively* vs. *Bowlby*, 162 U. S. 1, Mr. Justice Gray, in the course of an exhaustive opinion in which all the previous decisions of the Court are brought into view, says:

> "The United States, while they hold the country as a territory having all the powers both of National and municipal government, may grant for appropriate pur-

poses titles or rights in the soil below high water mark of tide waters, but they have never done so by general laws, and unless in some case of international duty or public exigency, have acted upon the policy as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters and in the soil under them, to the control of the States, respectively, when organized and admitted into the Union. Grants by Congress of portions of the public lands within the territory to settlers thereon, though bordering on or bounded by navigable waters, convey of their own force no title or right below high water mark and do not impair the title and dominion of the future State when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each State, subject only to the rights vested by the Constitution of the United States."

Other cases stating the same conclusions are the following:

Permoli vs. *First Municipality,* 3 How., 589;

Strader vs. *Graham,* 10 How., 82;

Cardwell vs. *American Bridge Co.,* 113 U. S., 205;

Hamilton vs. *Vicksburg Ry. Co.,* 119 U. S., 280;

Huse vs. *Glover*, 119 U. S., 543;
Williamette Iron Bridge Co. vs. *Hatch*, 125 U. S., 1.

The more recent cases in which this matter is discussed are *Coyle* vs. *Oklahoma*, 221 U. S., 559, in which Mr. Justice Lurton (p. 567) uses the following language:

> "'This Union' was and is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself. To maintain otherwise would be to say that the Union through the power of Congress to admit new States might come to be a Union of States unequal in power, as including States whose powers were restricted only by the Constitution when others whose powers had been further restricted by the Act of Congress accepted as a condition of admission. Thus it would result:
>
> **First, that the powers of Congress would not be defined by the Constitution alone, but in respect to new States enlarged or restricted by the conditions imposed upon new States by its own legislation admitting them into the Union, and**
>
> **Second, that such new States might not exercise all of the powers which had not been delegated by the Constitution, but only such as had not been further broken away as the conditions of admission.** * * *

> The plain deduction from this case is that when a new State is admitted into the Union it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original States and that such powers may not be constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations embraced in the act under which the new State came into the Union, which would not be valid and effectual if the subject of congressional legislation after admission."

If the contentions of counsel should obtain and it should be held that Colorado came into the Union forever precluded from asserting the same jurisdiction over the control and use of the waters of the streams of the State that may be asserted and maintained by any of the original States or by the State of Texas (where no public lands were ever held by the United States), then it would be apparent that Colorado is not permitted "to exercise all of the powers which had not been delegated by the Constitution" and that the State was not admitted upon an equality with the other States. Any such a restriction upon the powers of the new State would be invalid, as determined by the foregoing cases.

And in the already noticed case of *Kansas* vs. *Colorado,* in which, as a preliminary to a discussion of the relative rights of Colorado and Kansas to the waters of the Arkansas River, an innavigable stream, Mr. Justice Brewer said:

> "But when the States of Kansas and Colorado were admitted into the Union, they

were admitted with the full powers of local sovereignty, which belonged to other States, and Colorado, by its legislation, has recognized the right of appropriating the flowing waters to the purposes of irrigation."

And after speaking of the conflict between the laws of the two States, he says:

> "Now, the question arises between two States; one recognizing generally the common law rule of riparian rights and the other prescribing the doctrine of public ownership of flowing water. Neither State can legislate for or impose its own policy upon the other. * * * Each may determine for itself whether the common law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purpose of irrigation shall control. **Congress cannot enforce either rule upon any State."**

It would seen that what we have already said would be sufficient to dispose of the question, nevertheless it may be contended that we have not yet definitely brought within the principles enunciated, the matter of whether a State, as against the United States, can absolutely exclude the United States from claiming either sovereign or proprietary interests in its waters, or whether the United States can, by Act of Congress, legislate concerning the same.

Generally speaking, we understand that the laws of Congress applicable to territories, so far as they

concern matters over which the State will have ultimate sovereignty are as temporary as the government title to lands included therein; that is, the rules and principles of territorial government are temporary and subject to be displaced upon the coming in of the State. If, for example, Congress should have given to its lands the common law incident to riparian ownership, the State, in its wisdom, could have displaced that doctrine by the necessary and therefore more appropriate doctrine of appropriation. Or, if the State had deemed the common law doctrine the necessary and appropriate one, it would not be restrained from adopting it by the act of 1866. Iowa and Missouri were as much a part of the Louisiana Purchase as was that portion of Colorado included within the Republican River drainage. Both these States have adopted the common law of riparian rights and the same may be said of newer States admitted since 1866. It certainly cannot be said that these States acted within their powers. If they did so act, then Colorado must be free to adopt any rule it may find best adapted to its general welfare. Such is certainly the logical conclusion to be drawn from the following cases:

In *U. S.* vs. *Rio Grande Irrigation Company*, 174 U. S., 690, after referring to the common law doctrine of riparian rights, Mr. Justice Brewer said (p. 702):

> "While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a State may change this common

law rule and permit the appropriation of the flowing waters for such purposes as it deems wise."

In *U. S.* vs. *Cress*, 243, U. S., 316, Mr. Justice Pitney says:

"The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks, (citing cases) subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations."

In *Hawkins* vs. *Bleakly*, 243, U. S., 210, Mr. Justice Pitney further says, speaking of what was claimed to be the constitutional guarantee secured to the inhabitants of the State of Iowa by the ordinance of July 13, 1787 (p. 217):

"It is contended that the guarantees contained in the ordinance were extended to Iowa by the Act of Congress approved June 12, 1838, establishing a territorial government and by the acts of the admission of the State into the Union. * * * This is easily disposed of. The Act of 1838 was no more than a regulation of territory belonging to the United States, subject to repeal

> like any such regulation, and the Act for admitting the State, so far from perpetuating any particular institution previously established, admitted it 'on an equal footing with the original States in all respects whatsoever.' The regulation, although embracing provisions of the Ordinance declared to be unalterable unless by common consent, had no further force in Iowa after its admission as a State and the adoption of a State Constitution, than other acts of Congress for the government of the territory. All were superseded by the State Constitution."

The cases cited by counsel refute rather than sustain their contention that the Government remains the owner and entitled to dispose of the waters of the arid States. A good deal of confidence seems to be reposed in the decision in *Winter* vs. *U. S.*, 207 U. S. 564, because it was rendered after the decision in the Kansas-Colorado case. But it will be observed that although the opportunity was presented to recognize the theory now advanced by counsel, the Court did not do so, but places its decision upon the basis of a reservation of water for certain lands concerning which the Government had entered into treaty obligations with the Indians. A resort to reservation as the basis of the Government's position in that case was a clear recognition of the fact that except for the reservation, plenary jurisdiction over its waters was vested in Montana upon its admission as a State. Moreover, the reservation was expressed in a treaty which, although entered into with an Indian tribe, nevertheless, possessed the quality of being superior to

the constitution and laws of Montana and of every other State as well.

U. S. Const., Art. 6, § 2;
Hauenstein vs. *Lynham*, 100 U. S. 483, 490;
U. S. vs. *Winans*, 198 U. S. 371.

The case of *Gutierres* vs. *Albuquerque Co.*, 188 U. S. 545, and that of *Boquillas Land & Cattle Co.* vs. *Curtis*, 213 U. S. 399, are not opposite to the present controversy, the first entitled case having to do with the territorial status of New Mexico, and the second having to do with the rights of a grantee of the State of Sonora to the waters of an arid State.

The same may be said of other cases cited, and while counsel have borrowed language from a large field of cases, each will be found upon a reading of the full decision to be either authority against appellee, overruled by subsequent decisions or not in point.

In all their quotations they fail to cite a decision of this count to the effect that the United States is the owner of the waters of the streams of the western States. Counsel uses the word "owns" as though it imported a greater property right than that of sovereignty. But ownership imports a mere proprietary relation to property. When a part of the territory of the United States is included within a State, the relation of the State to that territory becomes that of a sovereign—a status of paramountcy thereafter prevails antecedent and superior to proprietary right. The **sovereign right of domain** which temporarily resided in the United States **is assumed by the State, not transferred to it.** This sovereign right of dominion

over persons and property exists in every State without qualification, except as modified by the universal limitations of the Federal Constitution. Thus, as stated by Mr. Justice Holmes in *Bean* vs. *Morris, supra:*

> "Subject to such rights as the lower state might be decided by this court to have and to vested private rights, if any, protected by the constitution, the State of Montana has full legislative power over Sage Creek while it flows within the State."

Mr. Justice Van DeVanter succinctly stated the principle as applied to Colorado in *Snyder* vs. *Colorado Gold Dredging Co.*, 181 Fed. 62, 65, where he said:

> "In so choosing between these inconsistent doctrines (that is, the doctrine of riparian right vs. the doctrine of appropriation, etc.), Colorado acted within the limits of her authority first as a territory and then as a State, and her choice was recognized and sanctioned by Congress so far as the public lands of the United States were concerned."

Counsel cites the various Acts of Congress relating to public lands and the use of water under and subject to the laws of the several states. Unfortunately for counsel, the rulings of the Land Department are adverse to the claims made. While the opinions of the officers of the several departments of the government have no force in this Court beyond their persuasiveness, the opinions of the Land Department, to

whose keeping is committed the disposition of the public lands, may properly be referred to, because they indicate that counsel are now advancing a theory not heretofore entertained in that department.

As stated by Mr. Justice Lamar in *Pennoyer* vs. *McConnaughy*, 140 U. S., 1, 23:

> "The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statutes by the courts, is so firmly embedded in our jurisprudence, that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect."

In the regulations concerning right of way for canals, ditches, etc., under the Act of March 3, 1891, the Department of the Interior said:

> "The control of the flow and use of water is therefore a matter exclusively under State or Territorial control; the matter of administration within the jurisdiction of this Department being limited to the approval of maps carrying the right of way over the public lands."
>
> 26 L. D., 520, 524.

And on December 24, 1900, Acting Secretary Ryan reaffirmed the statement in *New Bear Valley Ir. Co.* vs. *Roberts*, 30 L. D., 382, 386, where he used the following language:

> "The question of the ultimate rights of the parties hereto in and to the waters of said streams under their respective notices of appropriation is solely within the jurisdiction of the state courts and in pursuance with the policy announced in the case of Chicala Water Co. vs. Lytle Creek, the Department will not attempt to interfere with the control of said waters or determine the rights of the conflicting claimants thereto, except insofar as may be necessary to ascertain whether the applicant has shown such *prima facie* right to the use thereof as will enable him to utilize for the purposes contemplated the grant for which he has applied."

In Re Withdrawal of Public Lands for Irrigation Purposes (1903), 32 L. D., 254, involved the construction of National Reclamation Act (32 Stat., 388). The Director of the United States Geological Survey recommended that all lands within one-half mile on each side of the center line of the Salmon River, State of Washington, **together with the water flowing thereon,** be withdrawn from entry on the ground that the same was required for engineering works under the National Reclamation Act. The communication was referred to the Attorney General of the United States for opinion. September 5, 1903, Assistant Attorney General Campbell rendered opinion

wherein he found that the United States had no authority or control over the waters of a stream exclusive jurisdiction of which, save for interstate navigation, was vested in the State of Washington. The opinion was adopted and thereafter followed by the U. S. Reclamation Service. (See Second Annual Report U. S. Reclamation Service, 1902-3, page 36.)

The opinion is especially pertinent in view of the fact that Assistant Attorney General Campbell appeared of counsel for the United States in the case of *Kansas* vs. *Colorado*.

In *Silver Lake P. & I. Co.* vs. *Los Angeles*, 37 L. D., 152-3, First Assistant Secretary Pierce, on September 9, 1908, stated that:

> "The Department is without jurisdiction to determine the question as to the right to water, that being a matter solely within the province of the state courts."

From the foregoing it is evident that Department clearly recognized the fact that it was dealing with the territory of the United States as the agency of Congress in a proprietary as distinguished from a sovereign sense and with the limitations imposed by the former against the breadth of the latter. That the department was right is evidenced by the opinion of Mr. Justice Van DeVanter in *Utah L. & P. Co.* vs. *U. S.*, 243 U. S., 389, 410, where he says:

> "Much is said in the briefs about several Congressional enactments providing or recognizing that rights to the use of water in streams running through the public lands

> and forest reservations may be acquired in accordance with local laws, but these enactments do not require particular mention, for this is not a controversy over water rights, but over rights of way through the lands of the United States, which is a different matter and is so treated in the right of way acts before mentioned."

And then he cites *Snyder* vs. *Colorado Gold Dredging Co.*, 181 Fed., 62, 69, to which we have already called attention.

Section 8 of the National Reclamation Act (Act of June 17, 1902—7 Fed. St. Ann., 1905, p. 1098), clearly limits the other provisions of that act and recognizes the same limitations upon the Government already noted with regard to the Act of 1891. Such was the statement concerning the effect of the act during the debates in Congress and such has been the interpretation thereof by the courts.

> *Con. Record,* Vol. 35, Part 7, pp. 6679-80;
> *Kansas* vs. *Colorado*, 206 U. S., 46, 92;
> *United States* vs. *Hanson*, 167 Fed., 881, 884; 93 C. C. A., 371;
> *Twin Falls Canal Co.* vs. *Foote*, 192 Fed., 583, 594;
> *Bergman* vs. *Kearney*, 241 Fed., 884, 892-3.

In the last case above cited (*Bergman* vs. *Kearney*), decided March 3, 1917, by the United States District Court of Nevada, it was contended that all unappropriated waters "belong to the United States Government" (p. 99), the same contention made by

counsel in this case, but the argument was treated by the Court as "largely academic, and could lead to no profitable or decisive conclusion," and the unappropriated waters were declared to be the property and under the control of the State (241 Fed., 892-3).

If the federal title is and must be the basis of all rights to the use of water, Congress must then supplant all state laws and regulations, which now vary in each of the States, and give uniformity to all the laws, rules and regulations respecting the initiation and maintenance of irrigation and other rights, the determination of conflicting claims to water and provide the official force necessary to meet the daily and hourly changes in the flow of the natural streams and the conflicting interests of the various appropriators. The conflicting claims of appropriators in adjoining States from the same stream can never be ascertained, adjudged or regulated so long as each State, or the State called upon to surrender to the demands of the other, refuses to recognize appropriations not made and used within its borders. It may be said that such a condition of uniformity may be obtained by judicial decree, as here attempted, which would mean that the Federal Court should formulate the rules which should govern. But this would be not only impractical, but in violation of the proper functions of the Court. That Court would be compelled to assume, as it here attempted, the legislative functions of both Nebraska and Colorado and to become, in effect, an administrative board constantly in session for the purpose of securing to the several appropriators and to the States as well, in respect to the proper utilization of water, the benefits of irrigation.

Without further discussion of the authorities or the principles involved, we believe sufficient appears to answer the contentions of counsel to the effect that the present source of title to the water of the streams of Colorado is the United States, even though Colorado has been a State since 1876; that all unappropriated water of the streams of the State is owned by the United States; that the appropriator takes his title from the United States and without regard to prohibitory provisions of State Constitutions and statutes and without regard to the declared public policy of the State; that Colorado has no sovereign title to the water of its streams because it can show no deed or direct grant from the United States; that the admission of the State of Colorado did not invest it with all the powers of sovereignty possessed by the original States and that the rights of the individual appropriator are higher and superior to the constitution and laws of the State where the diversion is made although those laws forbid the diversion of water for use out of the State, and, that by a mere suit in a District Court, the State may be deprived of its natural resourse and its executive officers coerced against its will and at the will of the private appropriator.

We respectfully submit that Colorado has a sovereign title to the water of this stream while it flows within its domain, over, above and superior to the titles of any appropriator; that the use of this natural resource within the borders of the State is necessary to the existence of the State and the general welfare of its people; that the claims of appellee, as confirmed by the decree of the District Court, operate to as completely deprive the State of the benefits of this

necessary life-giving element as though the waters so withdrawn from the State had been seized upon and perpetually annexed to the territory of the neighboring State; that by coercing the executive officers of the State into a disobedience of the Constitution, laws and the decisions of the courts of the State, the District Court has permitted appellee, as presenting a part of the territory of Nebraska, to expropriate a part of the territory of Colorado, over its objection and has burdened its territory with a perpetual foreign servitude of such a magnitude that the greater part of the water from the stream is forever to be withdrawn from the use of Colorado and its citizens; that the decree of the District Court does not compel an obedience with the laws of Colorado, but, on the contrary, compels a violation of the laws of the State by its executive officers and their successors for all time; and that for the foregoing and other reasons assigned in our principal brief, the District Court was without jurisdiction of either the parties to or subject matter of the litigation and that the same should have been dismissed.

Other Matters in Appellee's Brief.

Of the other matters discussed in the brief of appellee, such as may be of aid to the court are discussed at length in our former brief. While counsel makes various deductions from miscellaneous quotations of dictum to the effect that the public policy of Colorado is in favor of allowing its most valuable resource to be withdrawn and used in other States and that the executive officers of the State are merely being compelled to obey the law of the State when they are coerced into delivering the greater part of the water of

the Colorado stream to Nebraska users and to the deprivation of Colorado and her citizens, in the face of the prohibition against such action in the Constitution, laws and decisions of the courts and a contrary uniform policy of the State, nevertheless, the authorities cited fail to support these contentions and on the contrary bear out the argument of appellants set forth in their former brief and in the foregoing pages. It would serve no useful purpose to further discuss the subject and we allow the matter to rest upon the present presentation.

Conclusion.

By way of conclusion, we most respectfully urge upon the Court that the case at bar is of serious nature, even though the quantity of water involved is small when compared with other interstate streams. The precedent set by the decision in this case will necessarily effect and guide the action of the District Courts in litigations now pending on both the South Platte and Arkansas Rivers between appropriators in Nebraska and Colorado on the one hand, and in Kansas and Colorado on the other.

Notwithstanding all that has been asserted to the contrary in briefs of counsel, Colorado has never departed from her established public policy of insisting that she must have first use of the water of her streams while they flow through her territory. Her physical situation compels her to thus fully assert her claim, for the reason that water which has flowed from her territory never returns but goes down through neighboring states to the sea. While Colorado asserts the right to a preferred use of the water of her streams,

while the same flow through her territory, according to her soverign will, the fact remains that the forces of nature now and for all time will forbid the carrying into effect the doctrine in its final effect. Colorado cannot, if she would, erect a wall at her boundaries. The water of her streams, though diverted from one watershed to another and taken from one stream to supply the needs of lands within the drainage of another, nevertheless, finally forces its way by gravity, down the various streams to the interstate lines in an ever increasing volume and at those seasons of the year when most needed by consumers in other states, and, do what she will, Colorado cannot finally exhaust the flow of any of her many interstate streams at the interstate lines. In the instant case, it was offered for proof (R. 21) but rejected by the District Court, that notwithstanding the fact that more than the constant spring-fed flow of the stream has actually been diverted and used upon the upper reaches of the stream in Colorado, the greater part thereof returns to the streams and is available to appellee's canal after all other uses in Colorado have been satisfied. Yet, if as here, the upper use is forbidden in order to supply the lower appropriator, the lands of the upper user will again become arid in order that the lower user may have all the water. The water once allowed to flow down the stream can never return to the upper user. In this case it is conceded that the whole flow of the stream, except in cases of infrequent cloudbursts, is only 45 cubic feet per second at the maximum in Colorado and less than that amount at the headgate of appellee's canal. If the decree of the District Court is to be obeyed, appellee's canal would have first claim to the greater portion of this total

flow of the stream, not for use on Colorado lands, but for use in Nebraska and the water must be permitted to flow down the stream, unused, past the headgates of the Colorado consumers in order that it may be used in Nebraska. This is the fact notwithstanding the present first use in Colorado, while to some degree diminishing the Nebraska supply, nevertheless, serves the needs in both states.

It will be observed that, if the water of the Colorado streams may thus be forced down for first use in lower states, by decrees of Federal District courts entered in cases like the one at bar and where respondents were denied opportunity to prove the facts, as they were in this case (R. 21), then the District Courts have authority to as completely divest the upper state of the use of the water of its streams, by coercing the water officials and citizens of the upper state as was done in this case, as this Court would by such a decree entered in a suit where the states were parties and where they had been afforded opportunity to make their proof. Whether the water be taken by one or several decrees of District Courts operating upon the state officials or the citizens of the upper state, or by decree of this Court, in a suit between the states, the effect is the same. The water is taken from the upper state and made to flow unused to the lower, where, whether used or wasted, it passes on to the sea without benefiting the territory or people of the upper state.

So far as the effect upon Colorado is concerned, there is little practical difference between apportioning waters in the mass, or apportioning them by giving to appropriators in Nebraska or any lower State priority over appropriators in Colorado. We are probably

correct in saying that the latter would be the more fatal of the two, because it not only refuses to Colorado the full use of its waters, but it impairs the ability of Colorado to carry to its full fruition the doctrine upon which the use of water in Colorado is founded, namely: That the water belongs to the people and that its use shall at all times be beneficial. By beneficial is not meant privately beneficial alone, but beneficial from the standpoint of the initial public interest. In Colorado, and we think the same is true of all the arid States, the individual appropriator is but a cog in the machinery or process of irrigation development. He has no independent exclusive right to water, to do with it as he likes, as he may with all other forms of property. On the contrary, he is deemed to be using a public fund, and he must use it to the satisfaction of the public, and he is not left to determine that matter for himself. The State, in the person of its water officials, superintends his taking of water and must be daily satisfied that it is then necessary to his use. If he ceases to use it for an unreasonable time, his right ceases and the water returns to the common public fund of the State. He is never free from an obligation to the State and its citizens, as well as to those who are making a like use of the public waters. Thus it is that each State has by law, usage and custom formulated, with more or less claim to completeness, a system of irrigation, the foundation stone of which is necessarily administration. Each State is an administrative unit, in which the success of the system is dependent upon the centralization and unification of jurisdiction and authority in the sovereign power of the people. The rivers in

the arid States are fluctuating in volume and usefulness. They may have tidal aspects when the snows of the mountains are alternately melted by the warmth of the day and frozen by the chill of the night. Under these conditions, they rise and fall much after the order of the tides. During some days, and even months, the lower reaches, as was testified in the *Kansas-Colorado* case, may not contain upon the surface enough water for a thirsty horse. The South Platte River was of nature a dry stream-bed at the Nebraska line, yet now it is a stream of constant flow after Colorado has actually diverted all and more than all the water which annually flows from the mountains. More water now flows over the interstate line when the river is fully appropriated in Colorado than flowed of nature during the summer months. In the distribution of water for irrigation all contributing supplies, whether by storms or tributary streams, or other temporary causes, must be observed by the water officials and the right to water at the different points of diversion must be daily determined by the river, and even by barometric conditions then presented. Conservation is the paramount law in the distribution and use of water. Each State devises its own system. Each State is a law unto itself and not unto another, and each State must be unimpeded in the carrying out of its system, else the condition of efficiency, which it is the object of the State to maintain, will be impaired, if not destroyed.

It must be perfectly evident, therefore, that if an appropriator in a lower State may inject his supposed right into that system, he not only takes the water from some one or more of the parties to that

system, but impairs the system itself. In other words, he does not strike at an individual appropriator only, but he strikes at the common welfare of the State as endeavored to be promoted by the system. If one appropriator in a lower State may inject himself into the distribution of water in an upper State, a second, a third and an indefinite number may do so, and thus we would have such a series of interpolated claims that the principal duty of the upper State would be to administer its waters in behalf of appropriators in the lower State.

Priority of appropriation is but a fiction and worthless theory without administration. The object of the rule is to form a foundation or basis for administration. But the superstructure of the laws and rules of administration is as varied as the states. Each has its own rules and methods of effecting the use of the water of its streams so as to best serve local conditions. Very different methods of irrigation apply in the high mountain valleys than obtain upon the arid plains and methods in semi-humid regions differ from those in arid. Administration, which after all is what governs the use, is necessarily a local problem, varying not only with states but in different localities of the same state. There is no uniformity in the laws of the several arid States concerning the acquisition, use or administration of water. A cursory examination of the laws of the several States, as set forth in Part 8 of *Weil on Water Rights*, Third Edition, will verify this statement. Not only is there no concurrence of the statutes, but there is a wide variance in judicial opinions, depending to a large degree upon the extent to which the judges are unable to rid themselves of their inherent

juridical conceptions of the sacredness of private property. The initiation and history of water rights in Nebraska is different from Colorado. The administration of water in each State is by a different system. Nebraska has adopted the Wyoming system, as opposed to the Colorado system, for administration of all appropriations since 1889, but riparian rights patented prior to 1889

In addition to present variations in the laws of the several arid States it must be borne in mind that still obtain in Nebraska for all riparian lands still others may occur, as the law, as well as the practice of irrigation and, indeed, of all other uses of water, is still in a state of flux. In no respect has the law or practice settled down to the fixity of the common law doctrine. Colorado is not bound to continue its present laws or make them conform to those of Nebraska nor is Nebraska or Kansas bound to maintain harmony with the laws of Colorado as the basis of a sovereign or individual right to water. Suppose Colorado should conclude to adopt laws similar to Nebraska, conceding to riparian owners the right to irrigate, and thus by uses following the course of the stream the water should be exhausted before it passed into Kansas or Nebraska, would these riparian rights be subject to curtailment in the interest of the lower State or other appropriators?

We have commented thus at length for the purpose of trying to convey to the court the necessity for local state administration of the waters of the streams, according to local laws and regulations, free from interference from without and unburdened with foreign servitudes enforced against the will of the state by coercion of state officers and citizens thru

orders or decrees of District Courts whereby the will of the people of the state, as expressed by its constitution, laws and the decisions of its courts, is overriden and made subordinate to the will of other states or the citizens thereof, enforced through decrees of the District Courts.

We feel free to say that if the rights of the states to control and administer the water of their streams as they may will, be again upheld by this court, the whole subject will adjust itself through processes of nature and interstate agreements. If however the integrity of the states be impaired by decisions of the Court in this and other similar cases, the bars are let down for interminable litigation between the states, citizens of the several states, ambitious governmental departments desiring to accomplish their ends without regard to the limitations upon their powers or the sovereignty of the states, and by many other prospective litigants now but waiting the action of the Court.

We respectfully urge that the suit here involved affected a valuable natural resource of the state and the right of the state to control that resourse for its general welfare and the preservation of the state and its citizens; that the decree of the District Court, as affirmed by the Circuit Court of Appeals, expropriated part of the territory of Colorado for the benefit of the State of Nebraska, without the consent and over the objection of the former; that the case involves an attempt to control the action of the State of Colorado and involves the political direction of the executive officers of the state, contrary to the constitution and laws of the state; the suit and the decree entered therein involve a limitation upon the sovereign rights

of the State of Colorado; that the suit is in effect one against the state which was and is the real party in interest and a necessary and indispensable party; and that the District Court had no jurisdiction, the Circuit Court of Appeals committed error in deciding that the District Court had jurisdiction and in affirming the decree of the District Court and the decision of the Circuit Court of Appeals should be reversed and the case remanded with instructions that the same be dismissed.

Respectfully submitted,

LESLIE E. HUBBARD,
Attorney General of the State of Colorado,
Solicitor for Appellants.

FRED FARRAR,
DELPH E. CARPENTER,
CHARLES ROACH,
Of Counsel

OCT 27 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. [redacted]

ADELBERT A. WEILAND, AS STATE ENGINEER OF THE STATE OF COLORADO, ET AL., APPELLANTS,

vs.

THE PIONEER IRRIGATION COMPANY, APPELLEE.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

EDWIN H. PARK,
Solicitor for Appellee.

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INDEX.

PAGE

Motion to Dismiss or Affirm 3
Notice 4
Argument 5

CASES CITED.

Arbuckle vs. Blackburn, 191 U. S., 405 10
Cary Mfg. Co. vs. Acme Flexible Clasp Co., 187 U. S., 427, 428 7
Hull vs. Burr, 234 U. S., 712, 720 9
Lampasas vs. Bell, 180 U. S., 276, 282 9
Norton, Ex'r. vs. Whiteside, 239 U. S., 144 ..... 8, 9
Omaha Electric Light & Power Co. vs. City of Omaha, 230 U. S., 123 9
Western Union Tel. Co. vs. Ann Arbor R. R. Co., 178 U. S., 239, 243 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 435

ADELBERT A. WEILAND, AS STATE ENGINEER OF THE STATE OF COLORADO, ET AL., APPELLANTS.

vs.

THE PIONEER IRRIGATION COMPANY, APPELLEE.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

MOTION TO DISMISS OR AFFIRM.

Comes now the above named appellee by Edwin H. Park, its solicitor, and moves the Court to dismiss the appeal herein or to affirm the judgment of the Court of Appeals, upon the following grounds, to-wit:

First: An appeal will not lie to review the decision of the Court of Appeals in this cause, as the record discloses that while the jurisdiction of the trial court was invoked upon the dual grounds of diversity of citizenship and constitutional questions, the case was disposed of by both the trial court and the Court of Appeals upon other and different grounds.

Second: That this Court has no jurisdiction, for the reason that the constitutional grounds alleged in the bill of complaint were not considered by either the trial court or the Court of Appeals in the determination of the cause, nor did the result in this cause depend at all in its ultimate determination upon any constitutional ground or Federal question.

Third: That the appellants, having elected to appeal to the Circuit Court of Appeals, and the cause there having been affirmed, an appeal in this case will not lie to this Court.

EDWIN H. PARK,
Solicitor for Appellee.

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Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

NOTICE.

To Fred Farrar and Charles L. Allen, Solicitors for Appellants, and Leslie E. Hubbard, Attorney General of the State of Colorado:

Please take notice that on Monday, the fifth day of November, A. D. 1917, at the incoming of the Court on said day, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy, will be submitted to the Supreme Court of the United States for the decision of the Court thereof.

Attached hereto is a copy of the brief and argument to be submitted with said motion in support thereof.

EDWIN H. PARK,
Solicitor for Appellee.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 435

ADELBERT A. WEILAND, AS STATE ENGINEER OF THE STATE OF COLORADO, ET AL., APPELLANTS,

VS.

THE PIONEER IRRIGATION COMPANY, APPELLEE.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF AND ARGUMENT IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

This was an action brought in the United States District Court of Colorado by the appellee to restrain the appellants from interfering with the right of the appellee to divert, at the headgate of its ditch in Colorado, a given quantity of water, to be used for irrigation of lands within the State of Nebraska; to restrain the owners of senior priorities from diverting more water than their appropriations called for, and requiring the State Officials to shut down all ditches of junior priorities until the appellee's quantity of water for use in Nebraska had been supplied.

The bill alleges, first, diversity of citizenship (Record, page 4, Folio 7), and also, that the appellants were by their acts, under color of the laws of the State of Colorado, invading rights secured to the appellee by the Constitution and laws of the United States, as well as interfering with the right of the appellee to carry on commerce between the State of Colorado and the State of Nebraska in diverting and transporting, carrying and selling water to citizens of both Colorado and Nebraska for agricultural and domestic uses; also

pleading facts sufficient to show the infringement of such rights.

The bill further alleges the ownership by the appellee of a ditch constructed in 1890, the adjudication of water rights in the courts of Colorado, wherein the priority of the appellee's ditch was fixed as of the date of April 4, 1890, granting to the appellee fifteen feet of water in Colorado, but denying to the appellee any right to transport water into the State of Nebraska. The appellee then procured its rights to divert water to be adjudicated under the laws of the State of Nebraska, and in its complaint set forth those facts and alleged that the appellants were officials of Colorado and refused to recognize the Nebraska Decree or to permit the appellee to transport and carry water in its said ditch to the State of Nebraska for irrigation and domestic purposes, thus violating rights secured to it by the constitution and laws of the United States.

The appellee further alleged that for more than twenty years it had diverted and carried water into the State of Nebraska without hindrance or molestation; that by reason of furnishing such water and its continued use for irrigation, there had been built up under said ditch a large and prosperous community within the State of Nebraska dependent and depending upon such continued use of water.

The trial court found (Record, page 25), that landowners in the State of Nebraska had used and applied to beneficial purposes the water carried in said ditch since the construction of the ditch, and that they were entitled to continue the use thereof, and to twenty-five second feet of water; that the use of the water should have for its date of priority the same date as fixed by the Colorado decree in the adjudication proceeding, to-wit, April 4, 1890. No other questions were decided by the Court (Record, page 25). Upon appeal to the Circuit Court of Appeals, after the determination of the question the jurisdiction of the parties (hereafter referred to), the Court likewise found, and affirmed the judgment upon the ground that the water had been put to beneficial use by the Nebraska farmers during all the period since the construction of the ditch, and "that by reason of such continued beneficial use a vested right of property to the continued use thereof existed in the plaintiff." (Record, page 56.) So that there was no constitutional or Federal question involved in the determination of the case, nor was it necessary to, nor did either Court, determine any such question in granting to the appellee practically all the relief demanded in its complaint.

The jurisdictional question above mentioned was brought into the case by the appellants, who, by motion to dismiss,

contended that, insofar as the appellee had made parties defendant, the officials of the State of Colorado, to whom are delegated the duty of distribution of water for irrigation, and sought to require such officers to disregard the laws of the State of Colorado and to distribute water from this stream in violation of the State law, we were suing the State, not the officers. That question was by both the trial court (Record, page 8), and by the Court of Appeals (Record, page 54) resolved in favor of appellee. However, that question is not the constitutional or Federal question which excepts the case from the provisions of section 128 of the judicial code and permits an appeal to this Court.

This question of the jurisdiction, to-wit, that the State was being sued instead of its officers, was a question injected into the case by the appellants, and an adverse decision upon that question would have enabled them, under Section 238 of the judicial code, to have taken an appeal direct to this Court. Having gone to the Court of Appeals, they must abide its decision. As said in *Cary Mfg. Co. vs. Acme Flexible Clasp Co.*, 187 U. S., 427, 428:

> "Although it is insisted that the judgment imposing the fine was a final judgment in the criminal matter, it is argued that it involved the denial of constitutional rights and hence that this Court has jurisdiction under Section 5 of that act; but it is settled that even if a party might be entitled to come directly to this Court under that section, yet if he does not do so and carries his case to the Court of Appeals, he must abide by the judgment of that court. Robinson vs. Caldwell, 165 U. S., 359; American Sugar Refining Co. vs. New Orleans, 181 U. S., 277; Huguley Mfg. Co. vs. Galleton Cotton Mills, 184 U. S., 290; Ayres vs. Polsdorfer, 585 Post."

Our contention is that, notwithstanding the bill of complaint invoked the jurisdiction of a Federal court upon the dual grounds of diversity of citizenship and constitutional questions, yet both courts having disposed of the case without a consideration of constitutional or Federal questions, but disposed of the case solely and alone upon questions of substantive law and evidencial facts, the case must now be viewed as one in which the jurisdiction of the Court was invoked solely and alone upon the ground of diversity of citizenship.

In other words, to be appealable, the final judgment must be the result of, be based and depend upon, the construction and application of some Federal law to the facts involved, and if

some Federal law is not so construed and applied and the judgment rendered is not the result of such construction and application, an appeal will not lie from a Circuit Court of Appeals to this Court, where the only other jurisdictional ground is that of diversity of citizenship, notwithstanding jurisdiction may have been originally invoked upon both grounds.

In the case of *Norton, Ex'cr. vs. Whiteside*, 239 U. S., 144, the jurisdiction of the trial court was invoked both upon the ground of diversity of citizenship and "that the cause of action was one arising under the constitution and laws of the United States."

Of this the Court said, speaking through Chief Justice White, at page 147:

> "This, however, does not suffice to solve the question since it is settled that a mere formal statement to that effect is not enough to establish that the suit arises under the Constitution and laws of the United States, but that it must appear that 'it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, *upon the determination of which the result depends.*'" (Italics ours.)

In the case at bar the question of the right of the appellee to divert water in Colorado for irrigation of lands in the State of Nebraska was the question to be determined, and for the purpose of bringing the question before the Court in all its aspects it was first alleged that the appellee had a right under the Constitution and laws of the United States to so divert and carry the water, notwithstanding the contention of the State of Colorado as to its exclusive right of ownership and control of such waters. That in addition to being protected in such right under the Federal laws, the appellee also alleged that it had a vested right in such water and to continue to carry and deliver the same in Nebraska because it had for more than twenty years without hindrance or molestation so diverted, and carried the same, and put to beneficial use in Nebraska the given quantity of water.

In deciding the case both the trial court and the Court of Appeals laid aside the contention raised by the issues under the Federal law and based their decisions entirely upon the fact that the evidence discloses a vested right in the appellee because of the use of such water for a period of more than twenty years. In other words, the Court protected the right which had become vested by such use, and did not determine, nor pass upon, the question of ownership either un-

der the laws and Constitution of Colorado, or the rights asserted under the Federal Constitution and laws.

That being the case, it was not necessary for either Court to determine, nor did they determine, any question of constitutional or Federal law, nor did the result of the case depend thereon. For that reason we contend that the case comes squarely within the rule laid down by this Court in *Norton vs. Whiteside, supra,* where an appeal was dismissed under similar allegations contained in the bill.

In the case of *Hull vs. Burr,* 234 U. S., 712, 720, the Court in defining when a suit is one arising under the laws of the United States, speaking through Mr. Justice Pitney, said:

> "The rule is firmly established that a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States upon the determination of which the result depends."

In *Western Union Telegraph Co. vs. Ann Arbor Railroad Co.,* 178 U. S., 239, 243, the Court, speaking through the late Mr. Chief Justice Fuller, said, at page 243:

> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States *upon the determination of which the result depends,* it is not a suit arising under the constitution or laws." (Italics ours.)

Like language is quoted with approval by this Court in *Lampasas vs. Bell,* 180 U. S., 276, 282.

In *Empire State Mining Co. vs. Hanley,* 198 U. S., 292, in an appeal from the Circuit Court of Appeals of the Ninth Circuit, where the jurisdiction of the Court was invoked, not only upon the ground of diversity of citizenship, but also, it was contended, upon Federal questions, the late Chief Justice Fuller again said, speaking for the Court, at page 298:

> *"The decisions of the courts below did not turn on any federal question."* (Italics ours.)

And as the case was decided upon questions of fact and substantive law, this Court dismissed the appeal.

Another case quite similar to the one at bar is that of the *Omaha Electric Light and Power Co. vs. City of Omaha,* 230 U. S., 123, where the company alleged in its bill of complaint, not only a diversity of citizenship, but that the City of Omaha

threatened, by its acts, to invade rights secured to it by its franchise, and thus violate rights secured to it by federal law. Like the case at bar the relief sought was a perpetual injunction restraining such threatened acts. The Court there held that the bill did not allege sufficient facts to show the case to be one arising under the constitution, or that the plaintiff was asserting any right, privilege or immunity under the constitution, or in any wise invoking its protection, while the bill in the case at bar goes further and does claim protection under the constitution and laws of the United States. Yet the relief sought was granted not upon such contention, but upon the securing of vested rights by long continued user. The result is the same as in the Omaha case, where Mr. Justice Van Devanter said, page 125:

> "For anything that appeared the plaintiff was planting its right to relief entirely upon the doctrine of estoppel. As a basis of jurisdiction, it is not enough that recovery might be sought upon a constitutional ground, for it must clearly appear that it is actually so sought. Crowell vs. Randell, 10 Pet., 368, 392. Hanford vs. Davies, 163 U. S., 273, 280."

We therefore contend that, notwithstanding we sought recovery in this cause upon constitutional grounds, yet it not being the basis of the decision nor involved therein so far as the determination of this cause was concerned, diversity of citizenship was the only ground upon which jurisdiction was invoked, and thus, as said by Mr. Justice Van Devanter in the above case, at page 126:

> "It being thus apparent that diverse citizenship was the sole ground upon which the jurisdiction of the Circuit Court was invoked, it follows that the decision of the Circuit Court of Appeals was final."

Again, in *Arbuckle vs. Blackburn*, 191 U. S., 405, jurisdiction of the Federal court was likewise sought upon the ground of diversity of citizenship and federal law, and it was contended, in support of the appeal from the Circuit Court of Appeals of the Sixth Circuit, that the case did not rest wholly upon diversity of citizenship, but that it was one arising under the constitution of the United States, the Court held, page 413, that the case did not really and substantially involve a dispute or controversy as to the effect or construction of the constitution, and that the result of the case did not depend thereon, the appeal was dismissed. That case is au-

thority here, because, notwithstanding our controversy could have been disposed of upon the constitutional grounds, yet, as the Court did not so dispose of it, but did dispose of it on other grounds, the constitutional question was not so involved as to permit an appeal to this Court; and because of such fact the decision of the Court of Appeals was and is final.

Other decisions might be cited, but we deem these sufficient to demonstrate that, notwithstanding jurisdiction of a Federal court is invoked upon the grounds of diversity of citizenship and also upon constitutional questions, yet where a case is determined solely and alone upon other grounds and an appeal has been taken by the losing party to the Court of Appeals and is there affirmed, such decision of the Court of Appeals is final, and no appeal will lie to this Court, *because the construction of the Federal constitution or Federal law was not involved in the decision and was not determinative of any issue in the case*, notwithstanding, the case could have been disposed of upon such issue. In the case at bar the case having been disposed of independent of any such question and solely upon the evidence and substantive law, the decision of the Court of Appeals is final and this appeal should be dismissed.

All of which is respectfully submitted.

EDWIN H. PARK,
Solicitor for Appellee.

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JAMES D. MAHER,
CLERK.

In the Supreme Court of the United States

October Term, 1917

No. 435 [redacted] 3

ADELBERT A. WEILAND, as State Engineer of the State of Colorado, *et al.*,
APPELLANTS,

vs.

THE PIONEER IRRIGATION COMPANY,
APPELLEE.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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SUBJECT INDEX.

PAGE.

PRELIMINARY STATEMENT 1-6

REVIEW OF THE RECORD 6-17

THE BILL OF COMPLAINT 6-10

MOTION TO DISMISS 9-10

THE ANSWER 10-11

THE DECREE 11-12

ASSIGNMENTS OF ERROR 12

THE DECISION OF THE CIRCUIT COURT OF APPEALS. 13-16

ASSIGNMENTS OF ERROR ON APPEAL TO THE SUPREME COURT 16-17

ARGUMENT 17-28

CASES AND AUTHORITIES CITED.

Huguley Mfg. Co. vs. Galeton Cotton Mills, 184 U. S. 290, 294 25-26

Kansas vs. Colorado, 185 U. S. 128, 206 U. S. 46..... 11

Lamson et al. vs. Vailes, 27 Colo. 201..... 6

Mississippi R. R. Com. vs. Ill. Central R. R. Co., 203 U. S. 336, 341 24-25

Schulthis vs. McDougal, 225 U. S. 561, 568..... 22-23

Spreckles Sug. Ref. Co. vs. McLain, 192 U. S. 397, 408. 26

Union Pac. Ry. Co. vs. Harris, 158 U. S. 326, 328..... 26

FEDERAL ACTS, CODE—COLORADO CONSTITUTION AND LAWS.

Act of March 3, 1891, Section 5..... 27

Colorado Constitution, Art. XVI, Sections 5, 6..... 4

Judicial Code of United States, Section 238..... 27

Revised Statutes of Colorado, 1908, Sections 3317, 3276-3439 5

Session Laws of Colorado, 1911, p. 472..... 5

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PRELIMINARY STATEMENT.

The appellee has moved to dismiss the appeal herein or to affirm the judgment of the Circuit Court of Appeals upon two grounds, to-wit:

> "First. An appeal will not lie to review the decision of the Court of Appeals in this case, as the record discloses that while the jurisdiction of the trial court was invoked upon the dual grounds of diversity of citizenship and constitutional ques-

tions, the case was disposed of by both the trial court and the Court of Appeals upon other and different grounds.

Second. That this Court has no jurisdiction for the reason that the constitutional grounds alleged in the bill of complaint were not considered by either the trial court or the Court of Appeals in the determination of the cause; nor did the result of this cause depend at all, in its ultimate determination, upon any constitutional ground or Federal question."

Stripped of all unnecessary verbiage, this cause presents one fundamental question—the right of an appropriator of water for irrigation from an interstate stream in one State to demand water according to the priority or date of his appropriation against junior appropriators from the same stream in another State.

The Court will recall the original case now pending in this Court—Wyoming vs. Colorado and others—wherein this issue is squarely presented in a suit between States.

The case of Wyoming against Colorado was submitted upon briefs and oral argument in December, 1916. On March 6, 1917, the case was restored to the docket for reargument, the order specifying among other things:

"Counsel are requested to specially direct their attention to the rule which they deem should properly be applied to a solution of the controversy for decision; that is, whether the rights asserted are to be tested and determined solely by the application of the general principles of prior appropriation without regard to state boundaries, or whether, on the contrary, the principles of prior appropriation are subject to be restricted or their operation limited in this case by state lines, and if so, by what principles, under that assumption, the case is to be controlled."

The Court said further:

> "In view of the legislation of Congress concerning reclamation and the extensive public works which have been constructed under that legislation and the possible consequences which may result from the rule to be applied in the solution of this controversy, the clerk is instructed to notify the Attorney General of the United States of this order for re-argument."

In the case at bar the action was commenced by The Pioneer Irrigation Company, a Nebraska corporation, the owner of a ditch diverting water from the north fork of the Republican River used for the irrigation of lands within the State of Nebraska, to restrain the State Engineer of Colorado and his subordinate officers, and also the owners of certain ditches diverting water from the same stream in Colorado, from diverting water by means of the ditches in Colorado until and unless The Pioneer Irrigation Company had received water to the full capacity of its ditch for the irrigation of Nebraska lands under its appropriation decreed to it under and by virtue of the laws of the State of Nebraska.

The geography of these ditches is very simple. The North Fork of the Republican River is a peculiar stream, arising near the eastern boundary of the State of Colorado. It is fed by springs. It flows into Nebraska and ultimately, in conjunction with other streams, forms the Kaw River, a tributary of the Missouri. The land which may be irrigated from the stream in Colorado is limited to a very small area, being merely the bottom of a very narrow valley, where the stream has eroded the upper formation. In this valley a number of ditches have been taken out and the land irrigated thereby. The ditch of The Pioneer Irrigation Company heads in Colorado a few miles west of the Colorado-Nebraska boundary, but the major portion of the lands irrigated by it lie in the State of Nebraska.

The Constitution of the State of Colorado, Article XVI, Section 5, reads:

> "The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public and the same is dedicated to the use of the people of the State, subject to appropriation as hereinafter provided."

The following section of the Constitution provides that priority of appropriation shall give the better right as between those using water for the same purpose, but gives a preference, when there is not sufficient water, to those using it for domestic purposes over those using it for any other purpose, and to those using it for agricultural purposes over those using it for manufacturing purposes.

The appropriation of water under the law of Colorado is made by diversion and beneficial application, and the water is distributed to the users upon the basis of the priority of their appropriations.

Statutes of the State were enacted for the purpose of regulating in an orderly manner the distribution of water according to the priorities. Offices were created with jurisdiction over the distribution of water and other questions pertaining to the same general subject, the chief officer being the State Engineer. Under him are five Division Engineers (one over each of the five main drainage areas of the State) and seventy Water Commissioners, each commissioner having jurisdiction over a water district, the State being divided into districts for convenience of administration. These are executive officers, although they may exercise some quasi-judicial functions. An appeal lies from the Water Commissioner to the Division Engineer, and thence to the State Engineer, or the State Engineer may proceed on his own motion without the intervention of any appeal.

The statutes of the State also provide for a determination of the date and the amount of each appropriation through judicial proceedings, and the District Courts of the State of Colorado are given jurisdiction to adjudicate the priorities of right to the use of water. In these proceedings the decrees fix the number and the amount of each appropriation, and thereafter the water officials, that is, the State Engineer and his subordinate officers, must distribute the water in accordance with these decrees, and in no other manner.

See Revised Statutes of Colorado, 1908, on the subject of Irrigation—more particularly as to the Adjudication of Priorities, Sections 3276 to 3320; Duties of State Engineer, Sections 3321 to 3334; Division Engineers, Sections 3335 to 3352, also S. L. 1911, p. 472; Water Commissioners, Sections 3317 and 3353 to 3439.

It appears from the record in this case—more particularly from the bill of complaint—that proceedings for the adjudication of the various appropriations of water from the North Fork of the Republican River (the same being in Water District No. 65) were held in the District Court of the State of Colorado in and for Phillips County, where, in said proceedings, during July, 1912, a decree was made and entered adjudicating the dates and the amounts of the various appropriations from the North Fork of the Republican River. It further appears that The Pioneer Irrigation Company, plaintiff below, appeared in those proceedings and asked for a decree, adjudicating to its ditch a priority as of date April 4, 1890, for the amount of water which it claimed to have appropriated for the irrigation of lands in both Colorado and Nebraska; that this ditch was given a decree, Priority No. 6, as of date April 4, 1890, for 15 cubic feet per second of time for the irrigation of lands under it within the State of Colorado, but was denied a decree for the amount of water claimed for the irrigation of lands within the State of Nebraska, the Court specifically limiting its decree to the amount of water necessary for the irrigation of the Colorado lands, and holding that it was with-

out jurisdiction to award any decree for the irrigation of lands within the State of Nebraska. From this decree of the Court no appeal or writ of error was perfected by any of the parties to said proceedings.

This decree was consistent with a decision of the Supreme Court of the State of Colorado rendered in 1900—Lamson, et al. vs. Vailes, 27 Colo. 201.

REVIEW OF THE RECORD.

FIRST: THE BILL OF COMPLAINT.

Thereafter, on August 8, 1913, The Pioneer Irrigation Company filed its bill of complaint in the United States District Court for the District of Colorado, naming as defendants John E. Field, as State Engineer of the State of Colorado (succeeded by Weiland), Filmore Coggswell, as Division Engineer of Division No. 1, and Dwight L. Bower, as Water Commissioner of District No. 65, State of Colorado, and certain individuals, the owners of ditches diverting water in Colorado. The three state officials named as defendants are the State Engineer and the Division Engineer and Water Commissioner of the particular water division and water district of the State of Colorado affected in this cause.

Certain other appropriators of water within the State of Colorado, who were not, however, residents of Colorado, were not named as defendants.

There is no question as to the amount in controversy. The bill alleged diversity of citizenship, and *that the suit was brought to obtain redress for the deprivation by defendants, under color of laws and statutes of the State of Colorado, of the right and privilege secured to the plaintiff by the constitution and laws of the United States, providing for equal rights of citizens of the United States and of persons within the jurisdiction of the United States to carry on commerce between the State of Colorado and the State of Nebraska, and particularly, the right of complainant to divert water and transport, carry and sell the same*

to citizens of Colorado and Nebraska for agricultural and domestic purposes (fol. 7).

It alleges the construction of the plaintiff's ditch as of date March 4, 1894, with a carrying capacity of 92 cubic feet of water per second; the application of water to the amount of 15 cubic feet per second on the lands in Colorado, and 77 cubic feet per second upon the lands in the State of Nebraska, and recites the statutory proceedings hereinabove referred to, adjudicating the priorities of right on the North Fork of the Republican River. It also alleges that in the year 1913, in a proceeding then pending before a tribunal of the State of Nebraska known as the State Board of Irrigation, Highways and Drainage, the complainant herein appeared and obtained a decree adjudicating its right of appropriation of 77 cubic feet per second within the State of Nebraska as of date April 4, 1890, and further alleges that certified copies of this Nebraska decree were filed in the office of the State Engineer of Colorado and in the office of the County Clerk and Recorder of Yuma County, Colorado.

It alleges further that since 1895, the right of appropriation in Nebraska is identical with the provisions of the Constitution and laws of the State of Colorado; alleges compliance with the laws of Nebraska with respect to the diversion of water from a natural stream and the application thereof to a beneficial use.

The bill further alleges the refusal of the respondent state officers of the State of Colorado to recognize the decree of the State of Nebraska, or to recognize the right of the appellant to divert water to Nebraska because of its use for a period of more than twenty years. It alleges that these same state officers allowed the respondent ditch owners within the State of Colorado junior to April 4, 1890 (the date of the priority decree in Nebraska), to divert and apply water regardless of the rights of the appellant.

The complaint also alleges that the defendants were violating the law of Colorado in that they were diverting

more water than they could beneficially use, and that their ditches were not equipped with proper headgates and measuring weirs, as required by the law of Colorado.

The complaint further alleges in substance that *by reason of the matters and things set forth, the complainant's rights secured to it by the laws of the United States have been invaded and it is deprived of rights safeguarded by the Constitution and laws of the United States, to its injury.*

An injunction was prayed restraining the respondent ditch owners in Colorado from diverting water until headgates were placed in their ditches; restraining the respondent state officials from interfering with the right of the complainant to divert 77 feet of water into its ditch for irrigation of lands in Nebraska; restraining senior priorities from diverting more water than necessary for the irrigation of their lands, *and requiring the respondent state officers to shut down all ditches with priorities later in date than April 4, 1890, until 92 cubic feet per second is supplied to the complainant's ditch* (fol. 11).

It is obvious, judging from the bill of complaint alone, without a consideration of the remaining portion of the record, that the plaintiff below invoked the jurisdiction of the Federal Court not alone on the ground of diversity of citizenship, but also upon the Federal question, that is, that the defendants, under color of the laws of the State of Colorado, were depriving plaintiff of rights and privileges alleged to be secured to it under the Constitution and laws of the United States, i. e., the alleged right to divert water from an interstate stream under its appropriation decreed to it by virtue of the laws of the State of Nebraska, according to the date and amount of its appropriation, against all junior appropriators from the same stream in the State of Colorado; and invoked the full faith and credit clause of the Federal Constitution.

It is true that the bill alleges a violation of the laws of the State of Colorado on the part of the defendants in this, that it is claimed that the ditches in Colorado were divert-

ing more water than their needs required and that these ditches did not have adequate headgates and measuring devices as required by the laws of Colorado. We will later show, however, that these last questions, that is, the alleged violations of the laws of Colorado, were by the trial court dismissed from the case and the decision was based on the Federal questions involved.

SECOND: MOTION TO DISMISS.

We have previously shown that the State Engineer, the Division Engineer and the Water Commissioner are executive officers of the State of Colorado, required under their oaths of office to administer the irrigation law of this State; that the law of Colorado judicially determined by the Supreme Court of this State, denies to an appropriator of water in a lower State the right to a decree adjudicating his appropriation in this State; that these executive officers are expressly required to distribute the water appropriated in this State according to the priorities as established and determined judicially, that is, according to the decrees. Therefore, these executive officers named as defendants in this cause were not only authorized, but were required to distribute the water of the North Fork of the Republican River according to the decree of the District Court adjudicating these appropriations. Practically speaking, this required that certain ditches junior to the ditch of the plaintiff be allowed to divert regardless of the amount available for the irrigation of lands in Nebraska. A tabulation of these decrees appears at folio 5.

In order to avoid confusion, it may be explained that the plaintiff is the successor of The Haigler Land and Canal Company. This company was awarded Priority No. 6, as of date April 4, 1890, for fifteen cubic feet of water, the amount appropriated for the irrigation of lands within the State of Colorado, as heretofore explained.

The respondent state officials moved to dismiss the bill for the reason that the Court had no jurisdiction, it appearing that the waters sought to be diverted by the plaintiff are the waters of a natural stream in the State of Colorado subject to the exclusive control of that State, and that these defendants are the agents and official representatives of the State, charged with the duty of regulating the distribution of the waters of the streams of the State. Also because it appears from the bill that the Court had no jurisdiction of the subject matter, the bill seeking to require the State of Colorado in the exercise of its sovereign power to do and perform, or refrain from doing and performing certain acts in the exercise of its sovereign power, of which the Supreme Court of the United States has exclusive jurisdiction; Further, because it appears from the bill of complaint that the State of Nebraska is a necessary and indispensable party, the bill averring that the title of the plaintiff to the right to divert water for use within the State of Nebraska is claimed by virtue of a rule and decree of the State of Nebraska; Further, because the Court has no jurisdiction of the subject matter, it being the purpose of the bill to obtain a decree that by a diversion of water within the State of Nebraska a priority of right had been obtained over appropriators of water within the State of Colorado; and because it further appears that these official respondents have been sued in their representative capacity as officials of the State of Colorado, the action being in legal effect against the State of Colorado in its sovereign capacity.

The motion to dismiss was denied. The ruling of the trial court was assigned as error, was considered by the Circuit Court of Appeals and sustained. It is assigned as error in this Court.

THIRD: THE ANSWER.

Eliminating from consideration at this time certain questions that were raised concerning other parties, ordered by the Court to be brought into the case, and the effect, if any, upon the question of the jurisdiction of the Court on

the ground of diversity of citizenship by reason of these proceedings, we pass to the answer, in which the defendants, appellants here, again raised the question of jurisdiction upon the grounds stated in the motion to dismiss, and also denied various allegations of the complaint and alleged certain matters in answer to the bill of complaint, which sought to show in substance that the complainant was in nowise injured by the diversion of water from the stream in question in Colorado, and to show all of the circumstances affecting the situation. In short, the defendants sought to show everything which might properly be considered in the determination of a case of this nature, as had been done by this Court in the determination of a similar case—Kansas vs. Colorado, 185 U. S. 128; 206 U. S. 46. The trial court refused the offer of proof touching practically all of these matters. These specific matters are not directly pertinent to the question now before the Court.

FOURTH: THE DECREE.

The decree, among other things, provides:

> "*That the requisite diversity of citizenship existed at the time of the bringing of this suit, and that this suit was brought to obtain redress for the deprivation by defendants of rights and privileges secured to the complainant by the Constitution and laws of the United States, and as a suit arising under the laws of the United States*" (fol. 46).

It then recites that the complainant is the owner of the ditch in question and fixes the carrying capacity of the ditch at 29 cubic feet of water per second at the Nebraska line, whereas the Nebraska decree, which it was insisted was entitled to full faith and credit, fixed it at 77 cubic feet per second. The decree also provides:

> "It is further ordered, adjudged and decreed that the respondents John E. Field, as State Engineer, Filmore Coggswell, as Division Engineer of Irrigation Division No. 1 of the State of Colorado,

and Dwight L. Bower, as Water Commissioner of District No. 65 in said Irrigation Division, and their successors in office, and all persons acting by, through or under them, be, and each of them is, hereby restrained and enjoined from interfering with the right of the complainant to said water as herein adjudged, and said defendants and their successors in office, and all persons claiming by, through or under them, or either of them, are hereby enjoined from treating the complainant in the distribution of water in said water district and division otherwise than it would be treated if said canal were wholly within the State of Colorado and all lands irrigated therefrom were in said last named State, *or in any manner depriving the complainant of the continued beneficial use and enjoyment of its said vested priority and property rights as herein found and decreed and as the same were and are recognized, defined and designated by the* decree of said District Court sitting in Phillips County in said cause No. 872, and of *said judgment and decree of the said State Board of Irrigation, Highways and Drainage of the State of Nebraska.*

It is further adjudged that any other question that may be included in the issues herein joined under the pleadings is not considered or determined, but is withdrawn and expressly left open for consideration and determination in any controversy that may hereafter arise."

FIFTH: THE ASSIGNMENTS OF ERROR.

For the purpose of their appeal to the Circuit Court of Appeals, these appellants assigned error to the rulings and decree of the Court, including the rulings on the question of jurisdiction in its various phases and on the fundamental question involved in the suit.

SIXTH: THE DECISION OF THE CIRCUIT COURT OF APPEALS.

In the opinion of the Circuit Court of Appeals, after a brief discussion of the facts, it is said:

> "After the filing of the complaint the defendants, state officials, interposed a motion to dismiss the same on the ground, among others, that the Court had no jurisdiction of the action or of the persons of the defendants for the reason that the suit was one against the State of Colorado without its consent, in violation of the provisions of the Eleventh Amendment to the Constitution of the United States. The motion was denied, and this ruling is assigned as error.
>
> In discussing the point raised by the ruling of the Court, counsel on both sides have by elaborate arguments gone into the question as to whether the State of Colorado is the owner of all the water flowing in the streams of Colorado. The defendants claim that the State is such owner and that the state officials who are made defendants are simply the agents of the State; hence the State is the real defendant, and the action cannot be maintained for the reason above stated.
>
> We do not think, however, that it is necessary to decide in determining the question before us, as to whether the State of Colorado is the owner of all the unappropriated water flowing in the streams of that State, as, conceding, without deciding, that Colorado is the owner of such waters, still we think the present action was not one against the State.
>
> The plaintiff alleges that it is the owner of a ditch which has diverted a certain number of feet per second of water from the North Fork of the Republican River in Colorado and has used said water for the irrigation of lands in Colorado and Nebraska for more than twenty years without any

complaint or hindrance from any one; that the said waters so diverted have been used in the proportion of 15 feet in Colorado and 77 feet in Nebraska, during the time mentioned. It also alleges that the officers of the State who are made defendants, refuse to allow the plaintiff to divert more than 15 feet, and require said 15 feet to be used in the State of Colorado.

The suit is not one to compel the state officers to act in violation of the laws of the State of Colorado, or to control the performance of their general duties, but is a suit which seeks to compel said officers to cease violating what is claimed to be the law of Colorado and the rights to which the plaintiff claims it is entitled. * * *

It is our opinion that the case cannot be said to be one against the State of Colorado within the meaning of the Constitution." (page 54).

The opinion also deals with the question of parties (which is of no particular interest in this immediate proceeding) and continues:

"At the trial the defendants offered to prove that senior ditch owners were using only the amount of water necessary for the irrigation of lands lying under such ditches, without waste. The court denied the offer for the reason, as the Court said, that it only intended to fix the relative priority of the plaintiff's ditch, and that whether or not other appropriators were diverting more water than they were entitled to, would not be decided but left open for some future proceeding; and the decree in this case does leave that question undecided. In view of this disposition of the case there was no error in this ruling.

The decree entered by the Court established the ownership of the plaintiff to the Pioneer Canal

and ditch; that the carrying capacity of the ditch at its headgate was 50 cubic feet of water per second of time; that the carrying capacity of said canal at the point where it crosses the Colorado and Nebraska state line is twenty cubic feet of water per second of time, and that said amount of water had, since the date of construction of the ditch, been put to beneficial use for the parties entitled thereto in the irrigation of lands within the State of Nebraska, and that by reason of such continued beneficial use a vested right of property to the continued use thereof existed in the plaintiff; that the plaintiff was entitled to divert from the North Fork of the Republican River that quantity of water at its headgate as would with reasonable care deliver at the Colorado-Nebraska state line to be measured at the measuring weir in said canal at the Colorado-Nebraska state line, 29 cubic feet of water per second of time for the use and benefit of parties lawfully entitled thereto in the irrigation of lands lying under said gate within the State of Nebraska.

The Court in its decree followed the decision of the District Court of Colorado sitting in Phillips County as to the right of the plaintiff in point of time to divert water to be carried in said canal for the purposes of irrigation. The judgment of the District Court was to the effect that the plaintiff's date of priority was April 4, 1890, and in order of time, No. 6. The decree then enjoined the state officials and their successors in office from interfering with the right of the plaintiff to said water as therein adjudged, and from treating plaintiff in the distribution of water in said water district and division otherwise than it would be treated if said canal were wholly within the State of Colorado and all lands irrigated therefrom were in the said State. It further decreed that any other question

that might be included in the issues joined under the pleadings would not be considered or determined, but would be considered as withdrawn and expressly left open for consideration and determination in any controversy that might thereafter arise."

The opinion then discusses certain other assignments of error going to certain questions of fact wherein it was sought to show all of the circumstances surrounding the case, and concludes:

> "That the decree rendered by the court below is erroneous in whole or in part, assuming the court had jurisdiction, and we decide that it had, is neither assigned as error nor argued in brief by counsel for the appellants. The decree appealed from therefore must be affirmed." (pp. 53, 54, 55 and 56.)

SEVENTH: ASSIGNMENTS OF ERROR ON APPEAL TO THE SUPREME COURT.

Appellants have appealed from the Circuit Court of Appeals to this Court, and have assigned error to each phase of the decision of the Circuit Court of Appeals, more particularly, to the various phases of the question of jurisdiction; to the ruling that this was a suit wherein it was sought to compel the officers of the State of Colorado to cease violating what is claimed to be the law of Colorado; and to the ruling to the effect that this is not a suit wherein it is sought to compel said officers to act in violation of the law of the State of Colorado; and to the ruling to the effect that a ditch diverting water for the irrigation of lands within the territorial limits of the State of Nebraska is entitled to take water for irrigation upon the basis of the date of its priority as against Colorado ditches diverting water from the same stream for irrigation of lands lying within the State of Colorado, the State of Colorado having at all times expressly declined to ignore its boundary lines in this regard and having at all times expressly de-

clined by legislation and the decisions of its courts to allow the same rights to the diversion of water according to the doctrine of priority of appropriation to be acquired outside of the State that can be acquired within; and to the decision of the Circuit Court of Appeals in effect refusing to consider the whole case presented by the record, inasmuch as the evidence offered and denied was pertinent and necessary to be considered.

ARGUMENT.

The appellee's motion to dismiss is based upon the theory stated in its motion, that while the jurisdiction of the trial court was invoked upon the dual grounds of diversity of citizenship and constitutional questions, the case was disposed of by both the trial court and the Court of Appeals upon other and different grounds; and this Court has no jurisdiction for the reason that the constitutional grounds alleged in the bill of complaint were not considered by either the trial court or the Court of Appeals in the determination of the cause, nor did the result in this case depend at all in its ultimate determination upon any constitutional ground or question.

Numerous cases are cited by the appellee to the effect that unless a Federal question is really and substantially involved in the determination of a cause, the decision of the Circuit Court of Appeals is final, and it is contended that inasmuch as no Federal question was decided by either the trial court or the Court of Appeals, therefore the appeal to this Court must be dismissed.

We have quoted at length from the record in order to show that a Federal question, or more properly, several Federal questions, are fundamentally presented in this suit. We believe that none of the cases relied upon by counsel for the appellee as authority for his motion to dismiss are applicable here. It is admitted—in fact, it could not be denied—that the plaintiff below invoked the jurisdiction of the Federal Court, not alone on the ground of diversity of

citizenship, but expressly and distinctly upon the ground of an alleged "deprivation by defendants, under color of the laws and statutes of the State of Colorado of the right and privilege secured to it by the Constitution and laws of the United States."

And further,

> "That by reason of the matters and things set forth, complainant's rights secured by the laws of the United States have been invaded and it is deprived of rights safeguarded by the Constitution and laws of the United States, to its injury."

It is now contended that although the jurisdiction of the court was invoked on Federal grounds aside from the question of diversity of citizenship, nevertheless the case was not determined upon any Federal question, but that on the other hand, both the trial court and the Circuit Court of Appeals determined that the plaintiff below was entitled to divert water according to its priority of right because of long continued user.

That this contention is erroneous appears in this, the trial court expressly and distinctly decreed "That this suit was brought to obtain redress for the deprivation by defendants of rights and privileges secured to the complainant by the Constitution and laws of the United States and as a suit arising under the laws of the United States."

But even had the decree of the trial court been silent on that question, nevertheless, fundamentally, the case could not have been determined in favor of the plaintiff except upon a Federal question. The plaintiff below has no right whatsoever, under the law of the State of Colorado, to the appropriation of water for the irrigation of Nebraska lands. It sought to have its alleged right under the laws of Colorado decreed to it in the tribunal having jurisdiction of the general question of the appropriation of water. In that proceeding the claim of the plaintiff for a decree establishing its right to an appropriation for the irrigation of Nebraska

lands was denied, but no appeal or writ of error was taken from this decision. It is therefore manifest that insofar as any claim to the right under the law of Colorado is concerned, the plaintiff is bound by this decision in the proceedings to which it was a party in the District Court of the State of Colorado sitting in Phillips County.

On the other hand, any right which the plaintiff may have by reason of the law of the State of Nebraska is of no value within the territorial limits of the State of Colorado, except and unless such right be invoked under the Constitution and laws of the United States. In other words, the law of Colorado has no extra-territorial jurisdiction, neither has the law of the State of Nebraska. Therefore, if this plaintiff has a right *in invitum* to divert water from the stream in question by reason of the priority of its appropriation, against appropriators in Colorado, that right can be invoked only under the Constitution and laws of the United States.

The apparent position of the appellee in this motion to dismiss is, that its right became vested by reason of long continued user. In other words, that it has a prescriptive right. And it is contended that it was upon this theory that both the District Court and the Circuit Court of Appeals determined the question. But the plaintiff below sought to invoke its right in the courts of the State of Colorado; it was denied, and it now makes what is apparently a collateral attack upon the judgment of the District Court of the State.

Furthermore, if the contention of the defendants be correct—and that is one of the questions to be determined by this Court—that the State of Colorado has the right to control the distribution of the waters of its streams, either exclusively or partially, then the position of the appellee that this is a prescriptive right becomes all the more absurd for the reason that a prescriptive right cannot be obtained or acquired against a State. Neither can the statute of limitations be pleaded against a State. This, we believe to be so elementary as to need no further argument.

We contend therefore that neither under the law of the State of Colorado, nor under the law of the State of Nebraska, did this plaintiff acquire any right to its appropriation as against Colorado appropriators upon the basis of priority; and, having participated in a proceeding wherein the Colorado priorities were adjudicated, and having been denied a decree under the law of the State of Colorado, and having failed to take an appeal, it cannot now be heard to question that decision or claim any right under the law of Colorado, either because of long continued user or otherwise. Neither can it make a collateral attack upon that judgment, but if it has any right whatsoever as against the officials or appropriators of water in Colorado, that right must be sought solely under the Constitution and and laws of the United States.

It may be that the question presented in this motion is to be tested solely by the allegations of the bill of complaint. Inasmuch, however, as we are somewhat in doubt, may we, in addition to an examination of the bill of complaint, call attention to other points which arose during the trial of this cause.

The defendants offered an exhibit which was objected to by the plaintiff upon the ground that it is incompetent, irrelevant and immaterial, whereupon the defendants were requested by the Court to state for what purpose the proof was offered. It was explained that it was intended to show that each of the respondent ditch owners or their predecessors in interest were riparian owners prior to the year 1889, of lands irrigated by them,—the purpose being to show that if these lands had been within the State of Nebraska, they would, under the law of that State, have been exempt as riparian owners of forty-acre tracts to the claim of any priority of appropriation. The Court denied the offer, stating that

> "The Nebraska decree, adjudicating rights to water for irrigation under the ditch in Nebraska must be recognized as the basis of the Nebraska right; otherwise, full faith and credit would not be given to it." (fol. 32.)

Again, the respondents offered to prove that owners of one ditch diverting water for irrigation within the State of Colorado were at the time of the commencement of the action and since have been residents and citizens of the State of Nebraska, of which the appellant was a citizen. The facts were thereupon admitted by the plaintiff, "but the offer is objected to as being immaterial for the reason that the jurisdiction of the Court does not depend in the case on diversity of citizenship. Held by the Court that if it did, it would not oust the Court of jurisdiction." (fol. 40.)

From these last two quotations, coupled with the statement which we have quoted from the decree itself, it is obvious that this case was tried upon the theory that there was invoked a Federal question; that the plaintiff's rights were predicated upon the Constitution and laws of the United States. This was the theory upon which the case was commenced, and likewise, the theory upon which it was tried and determined.

Now, although the trial judge and also the Circuit Court of Appeals may have failed to specify the particular Federal law, either constitutional or statutory, upon which they base this decision, it is manifest that the trial judge had in mind, among other things, the full faith and credit clause of the Federal Constitution and sought to apply that provision to the decree of the State of Nebraska. Moreover, no matter what particular constitutional or statutory provision he may have had in mind, he did decree the plaintiff's ditch to be entitled to divert water for the irrigation of Nebraska lands according to its priority, regardless of the fact that the defendants were appropriators within the State of Colorado. In short, he held to the principle of priority of right regardless of state lines—the identical question now before this Court in the original cause of Wyoming vs. Colorado.

The defendants challenged the jurisdiction of the trial court, contending that inasmuch as it appeared upon the face of the bill of complaint that the suit had been brought against the officials of the State of Colorado in their repre-

sentative capacity, and as these officials were by the law of this State forbidden to distribute the water except as decreed by the courts of this State, and inasmuch as this plaintiff had been denied a decree in Colorado for the irrigation of Nebraska lands, therefore this cause is in effect a suit against the State of Colorado; that the State of Nebraska was an indispensable party and that the Supreme Court of the United States alone had jurisdiction.

This motion to dismiss was denied. Had the defendant taken an appeal from the District Court directly to this Court, this question alone would have been certified, and, if we correctly understand the statute and the decisions thereon, all other assignments of error would have been waived. We therefore elected to appeal to the Circuit Court of Appeals, from which we believe we now have the right to appeal to this Court.

Adopting the language of several decisions cited in the brief filed herein by the appellee, we believe that it appears that the construction of the Federal Constitution or Federal law was involved in the decision and was determinative of the case. We believe that in every decision cited in support of the appellee's position, it is the express rule of this Court that an appeal from the Circuit Court of Appeals should be dismissed if the jurisdiction of the trial court depended upon diversity of citizenship entierly—the inference or express declaration of each decision being that if a Federal question was really and substantially involved the rule would be otherwise. We are of course eliminating from discussion that class of cases where by statute the decision of the Circuit Court of Appeals is made final.

Having thus shown that a Federal question was really and substantially involved in the determination of this case, may we now briefly review some decisions upholding our right to an appeal from the Circuit Court of Appeals?

In *Schulthis vs. McDougal*, 225 U. S. 561, a motion was made to dismiss the appeal upon substantially the same grounds as those presented in the present case. The Court says, at page 568:

"Our jurisdiction is challenged by a motion to dismiss the appeal. Section 6 of the act of March 3, 1891 (26 St. at L. 826, chap. 517, U. S. Comp. St. 1901, p. 488) declares that 'the judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being * * * citizens of different states,' and this refers to the jurisdiction of the federal court of first instance. Thus it becomes necessary to consider whether the jurisdiction of the Circuit Court depended entirely upon diversity of citizenship. If it did, the appeal must be dismissed. * * *

In opposing the motion the appellants contend that the case arose under certain laws of the United States, presently to be mentioned, and therefore was not one in which the jurisdiction depended entirely on diversity of citizenship. The consideration of the contention will be simplified if, before taking up the specific grounds on which it is advanced, the rules by which it must be tested are stated. They are:

1. Whether the jurisdiction depended on diverse citizenship alone or on other grounds as well must be determined from the complainant's statement of his own cause of action as set forth in the bill, regardless of questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings. (Citing cases.)

2. It is not enough that grounds of jurisdiction other than diverse citizenship may be inferred argumentatively from the statements in the bill, for jurisdiction cannot rest on any ground that is not affirmatively and distinctly set forth" (citing cases).

In the light of this decision the suit "refers to the jurisdiction of the Federal Court of first instance." It would therefore seem that the decision of the Circuit Court of Appeals would not be the test of the right to appeal here. And whether the jurisdiction depended upon diverse citizenship alone or on other grounds as well, "must be determined from the complainant's statement of his own cause of action as set forth in the bill, regardless of the questions that may have been brought into the suit by the answers or in the course of the subsequent proceedings." There can be no question as to this, that the plaintiff in its bill of complaint invoked the jurisdiction of the Federal Court upon the ground of a Federal question. In fact, it is admitted in its brief. Not only did the plaintiff contend that its right was based upon the Constitution and laws of the United States in its bill of complaint, but its case was tried throughout on that theory, as we have shown.

In *Mississippi R. R. Commission vs. Illinois Central R. R. Co.*, 203 U. S. 336, an appeal was taken from the United States Circuit Court of Appeals for the Fifth Circuit. The plaintiff took the position that the Circuit Court of Appeals had no jurisdiction to review the judgment of the Circuit Court because the jurisdiction was predicated upon diversity of citizenship and also on the claim that certain State statutes were unconstitutional. The opinion reads, at page 341:

> "The complainant in this case by a proper pleading set up, not only the diversity of citizenship, but also a constitutional question, and the complainant had the right to appeal from the judgment of the Circuit Court to the Circuit Court of Appeals and from its decision in such a case an appeal or writ of error may be taken to this Court. Am. Sugar Ref. Co. vs. New Orleans, 181 U. S. 277, 281; Huguley Mfg. Co. vs. Galeton Cotton Mills, 184 U. S. 290, 295. The case of Field vs. Barber Asphalt Paving Co., *supra*, does not hold otherwise. It simply holds that where the jurisdiction

of the Circuit Court attaches on the ground of diverse citizenship and also upon a separate and independent constitutional ground, the party may take a direct appeal to this Court. But it does not hold that the defeated party must do so and that he cannot go to the Circuit Court of Appeals."

In *Huguley Mfg. Co. vs. Galeton Cotton Mills*, 184 U. S. 290, an appeal had been taken from the United States Circuit Court of Appeals to this Court. A motion was made to dismiss the appeal. The Court says, at page 294:

"The Act of March 3, 1891, chapter 517 (26 St. at L. 826) provides in section six that the Circuit Courts of Appeals shall have appellate jurisdiction to review judgments and decrees of the Circuit Courts in all cases in which a direct appeal is not allowed by Section 5 to this Court, and that the judgments and decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely on diversity of citizenship.

The jurisdiction referred to is the jurisdiction of the Circuit Court as originally invoked. Colorado C. & T. Consol. Min. Co. vs. Turck, 150 U. S. 138; Press Pub. Co. vs. Monroe, 164 U. S. 105; Ex parte Jones, 164 U. S. 691; Am. Sugar Ref. Co. vs. New Orleans, 181 U. S. 277; Arkansas vs. Kansas & T. Coal Co., 183 U. S. 185.

If, after the jurisdiction of the Circuit Court attaches on the ground of diversity of citizenship, issues are raised the decision of which brings the case within either of the classes set forth in Section 5, then the case may be brought directly to this Court, although it may be carried to the Circuit Court of Appeals, in which event the final judgment of that Court could not be brought here as of right. Loeb vs. Columbia Trustees, 179 U. S. 472.

> If the jurisdiction of the Circuit Court rests solely on the ground that the suit arises under the Constitution, laws or treaties of the United States, then the jurisdiction of this Court is exclusive, but if it is placed on diverse citizenship and also on grounds independent of that, then if carried to the Court of Appeals, the decision of that Court would not be made final, and appeal or writ of error would lie. Am. Sugar Ref. Co. vs. New Orleans, 181 U. S. 277."

See also:

Spreckles Sug. Ref. Co. vs. McClain, 192 U. S. 397, 408.

The Union Pacific Ry. Co. vs. Robert E. Harris, 158 U. S. 326, 328.

Applying the rule expressed by the foregoing cases to the record as disclosed in this case, we find that the jurisdiction of the United States District Court for the District of Colorado was invoked by the plaintiff below in its bill of complaint, upon the grounds of diversity of citizenship and the alleged deprivation of rights, by defendants under color of the laws of the State of Colorado, guaranteed to plaintiff by the Constitution and laws of the United States, and also upon the full faith and credit clause of the Federal Constitution.

Aside from the express declaration in the bill of complaint, it is apparent that the cause involved the application of Federal law, both constitutional and possibly of the sort defined by this Court in the case of Kansas vs. Colorado, *supra*, as "interstate common law" analogous to international law. The jurisdiction of the trial court was challenged by the defendants. Therefore, from an adverse decision in the District Court these defendants had the right to an appeal directly to this Court, in which event, they had to waive the question of jurisdiction, if that be possible, in order that the constitutional questions involved might be considered by this Court. That is to say, we understand that if the jurisdiction of the lower court is challenged, that

question alone will be certified to this Court, although Section 5 of the Act of March 3, 1891 (Sec. 238 Jud. Code U. S.) gives the right to a direct appeal in cases involving the construction or application of the Constitution of the United States, the constitutionality of any law of the United States, the validity or construction of a treaty, or any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

The defendants below assigned error to various rulings of the Court—more particularly, to rulings denying the offer of evidence sought to be introduced in support of their fundamental position—that the State of Colorado, having refused to ignore its boundary lines and to recognize rights and appropriations in a lower State on the basis of priority, against its citizens—had the exclusive control of the distribution of water for irrigation within its territorial limits.

The defendants had the option of taking an appeal to the Circuit Court of Appeals, and inasmuch as the case originally involved Federal questions and the jurisdiction of the Federal Court was invoked upon grounds in addition to diversity of citizenship, and the determination of the case necessarily presented in a real and substantial manner these Federal questions, the decision of the Circuit Court of Appeals is not final, and an appeal to this Court is permissible.

Counsel for appellee has worded his motion in the alternative,—"to dismiss or to affirm." The grounds for the two motions are the same. In fact, the motion is more particularly one to dismiss. It is certain that the question involved in the case has not been determined by this Court, inasmuch as the Court now has before it for determination the original case of Wyoming vs. Colorado, which involves the fundamental question involved here.

It would seem therefore that nothing can be said in favor of affirming the decision of the Court of Appeals.

The only thing before the Court is the question of the right to appeal from the Circuit Court of Appeals to this Court.

Respectfully submitted,

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Of Counsel.

WEILAND, STATE ENGINEER OF THE STATE OF COLORADO, ET AL. *v.* PIONEER IRRIGATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 3. Argued January 17, 1919; restored to docket for reargument June 6, 1921; reargued January 10, 11, 1922.—Decided June 5, 1922.

1. Where a substantial claim of federal, constitutional right is set up in the bill, in addition to diverse citizenship, and is made the basis of decision in the District Court and the Circuit Court of Appeals, the decree of the latter court is appealable here under Jud. Code, § 128. P. 501.
2. Water of a stream flowing from Colorado into Nebraska was diverted in Colorado by a Nebraska corporation and transported through its canal to Nebraska where it was sold and used on Nebraska lands. *Held*, that the appropriation was superior in right to later appropriations from the stream made in Colorado for use on Colorado lands, and that state officials of Colorado were properly enjoined from interfering with it and from treating the appropriator, in the distribution of water, otherwise than if the canal and lands irrigated therefrom were wholly within that State, notwithstanding their objection that the waters of natural streams in Colorado are, by her constitution and laws, the property of the public dedicated to the use of her people and cannot be taken for use elsewhere as against persons desiring to use them in Colorado. P. 502. *Wyoming* v. *Colorado*, *ante*, 419.

238 Fed. 519, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court enjoining the appellants, officials of the State of Colorado, from interfering with the appellee's right to take water, in Colorado, from a stream flowing thence into Nebraska, for use on lands in Nebraska, and requiring them to recognize the appropriation, in the distribution of water, according to its priority.

Mr. Victor E. Keyes, Attorney General of the State of Colorado, and *Mr. Delph E. Carpenter*, with whom *Mr. Leslie E. Hubbard*, *Mr. Fred Farrar* and *Mr. Charles Roach* were on the briefs, for appellants.[1]

Mr. Edwin H. Park for appellee.

MR. JUSTICE CLARKE delivered the opinion of the court.

The appellants, defendants below, are citizens and officers of the State of Colorado, charged with official duties with respect to the distribution of water from streams of that State for irrigating purposes, and other citizens of Colorado, who need not be further noticed.

The appellee, plaintiff below, a corporation organized under Nebraska laws, is the owner of an irrigating canal by which it has diverted water from the North Fork of the Republican River, an interstate stream, at a point about six miles west of the east line of Colorado. Since 1890 one-third of the water thus obtained has been sold and used on lands in Colorado and the remaining two-thirds carried by the canal into Nebraska has been used on lands in that State.

This suit was commenced in 1913, in the District Court of the United States for the District of Colorado. The bill of complaint is not printed in full in the record, but the epitome of it shows that, in addition to diversity of citizenship as a basis of jurisdiction, it was averred that the right of appellee, under the Constitution of the United States, to engage in commerce between the States of Colorado and Nebraska by transporting water from the former into the latter and there selling it for agricultural and domestic purposes was being seriously impaired by the unconstitutional conduct of the state officials of Colorado

[1]At the former hearing the case was argued by *Mr. Carpenter* on behalf of the appellants.

in permitting, under color of the laws of that State, the wasteful use of the water by appropriators prior in right, and the use by others subsequent in right, to a valid appropriation by the appellee. There was also a general allegation that rights of appellee secured to it by the Constitution and laws of the United States had been invaded by the action of the appellant officials. A decree permanently enjoining this alleged unconstitutional action by the state officers was prayed for.

In its decree the District Court found that there existed the requisite diversity of citizenship to give the court jurisdiction and also that the "suit was brought to obtain redress for the deprivation by defendants [appellants] of rights and privileges secured to the complainant [appellee] by the Constitution and laws of the United States" and that therefore it was a suit arising under the laws of the United States. The court found that the carrying capacity of appellee's ditch at the Nebraska state line was 29 cubic feet of water per second, that since the date of the construction of the ditch in 1890 that amount of water had been put to beneficial use in the irrigation of lands within the State of Nebraska, and that by reason of such continued beneficial use there had become vested in the appellee a property right to the continued use thereof. The Colorado officials, and their successors in office were enjoined, "from interfering with the right of complainant [appellee] to said water as herein adjudged, and . . . from treating the complainant in the distribution of water . . . otherwise than it would be treated if said canal were wholly within the State of Colorado, and all lands irrigated therefrom were in said last named State."

The court declined to consider the question of the wasteful or other use of the water by other appropriators in Colorado and confining its decree to the one point dealt with in the injunction, expressly left open for considera-

tion and determination in another proceeding all other issues joined under the pleadings.

The Circuit Court of Appeals affirmed the decree of the District Court and on the contention that a constitutional question is involved the case is brought here for review.

The appellee filed a motion in this court to dismiss or affirm, which was passed to hearing on the merits.

In support of the motion to dismiss it is argued that although jurisdiction was invoked in the bill on sufficiently alleged federal grounds, in addition to diversity of citizenship, nevertheless both the District Court and the Circuit Court of Appeals sustained appellee's use and disposition of the water in Nebraska as one merely of prescriptive right, derived from twenty years of undisputed use and not upon any federal constitutional ground, and that therefore the jurisdiction exercised rested wholly upon diversity of citizenship and an appeal does not lie from the decision of the Circuit Court of Appeals under § 128 of the Judicial Code.

The ground of federal jurisdiction, other than diversity of citizenship, being sufficiently set up in the bill, such a motion to dismiss can prevail only if the claim is so unsubstantial as to be frivolous. *Shulthis* v. *McDougal*, 225 U. S. 561; *Lovell v. Newman & Son*, 227 U. S. 412, 420. But such clearly was not the fact in this case.

It is entirely clear that the essential and substantial issue in the case arose from the assertion by the appellee of the federal constitutional right to transport water, derived from an interstate stream, from Colorado into Nebraska under its priority of appropriation as of 1890, and the denial of this claim by the appellant state officers, based upon the contention that water in natural interstate streams in Colorado, having been declared by the constitution and laws of that State to be the property of the public, dedicated to the use of the people of Colorado, the right could not be obtained by appropriation and beneficial

use, to carry such water into an adjoining State for like use, as against persons desiring to use it in Colorado, even though junior in point of date of appropriation. Both lower courts denied this contention of the state officials, appellants, and enjoined them from treating the appellee in the distribution of water otherwise than as if the state line had not existed, and the land irrigated had been wholly within the State of Colorado. It is thus plain that the decree appealed from necessarily rested, not upon Colorado laws or decisions which attempted to deny the asserted right to the use of the water in Nebraska, nor upon Nebraska laws or decisions which could not be effective in Colorado, but upon rights secured to the appellee by the Constitution of the United States. This substantial and very fundamental question being in the case, and essential to the disposition which was made of it, the motion to dismiss must be overruled.

As to the merits of the case. In the discussion of the jurisdictional question it has been sufficiently developed that the essential controversy here involved is whether priority of appropriation of water, from the part of an interstate stream in Colorado, for beneficial use on lands in Nebraska, into which State the stream in a state of nature flows, gives superiority of right over later appropriation also made in Colorado from the same stream, but for use in that State.

Both of the lower courts held that the presence of the state line did not affect the superiority of right and enjoined the Colorado state officials from treating the appellee in the distribution of water otherwise than it would be treated if the canal were wholly within the State of Colorado and all the lands irrigated therefrom were in that State.

The question thus presented is so fully disposed of on principle and authority in the opinion of the court this day announced in No. 3 Original, *Wyoming* v. *Colorado*,

ante, 419, that further discussion of it would be superfluous and upon the authority of that decision the decree of the Circuit Court of Appeals is

Affirmed.